R. A. Brock

The Young Lawyer's RECREATION

Sept. 24. 187

BEING A

CHOICE COLLECTION

Of several Pleasant

Cases, *Passages*, and *Customs*

IN THE

LAW:

For the Entertainment as well as Profit of the *Reader*.

—Si quid novisti Dulcius Istis,
Candidus imperti, si non, his utere mecum.

LONDON,
Printed for Samuel Briscoe, *over-against* Will's *Coffee-House in* Russel-Street, Covent-Garden, 1694.

TO THE READER.

Courteous Reader,

THO' no Profession is more Honorable and Profitable than that of the Law, witness the many great Titles and vast Estates acquired thereby, yet (perhaps) it is of all other Studies the least Pleasant and Entertaining, which (no doubt) is the Reason that so few are contented with the Honour to know It, without the other Encouragement; and to such as have That, I do not say it is Unpleasant; or if it be, yet when the Pill is Gilt, it is easily swallowed. However, in some sence every Man is a Lawyer, that is, supposed to be so; so Charitable is the Law to allow Ignorance in none, because every Man would make that his Excuse, and none could tell how to confute him. And (as the Lord Vaughan says) it is

irrational to suppose Men ignorant of those Laws for the breach of which they are to be punished.

But how Intricate soever this Study may seem in general, it cannot be imagined but that among so great variety of Cases there will be found some of a double Capacity, as well to please as to instruct.

Of this sort, Reader, is the Collection I here present you with, taken from the Reports, and other Authentick Books of Law, all along most faithfully quoted and referred to.

Some may Object against the Method, or indeed that I have used none; but this let the Table answer, there being many Things that follow naturally enough, which yet cannot properly be reduced under the same Head; my Design herein being chiefly to Delight, which I thought could not be so effectually done any other way by

Your very humble Servant

Philonomus.

THE

THE

TABLE.

A

Page

Abatement of Writ, 19, 178, 179, 192,
Accessary, 35, 36, 144.
Action, 59.
Action upon the Case, 59, 140, 164, 167, 168, 180.
Addition, 190, 192.
Admiralty, 136, 137, 170.
Advowson, 189.
Age, 3, 15.
Agent and Patient, 50, 51.
Alien, 122.
Arrest, 85, 163, 198.
Assault, 202.
Attainder, 46.
Attaint, 38, 39, 79.
Attorney, 191.
Attornment, 77.
Averment, 101.
Avoidance, 86, 87.
Award. 77.

B.

Baron and Feme, 57, 97, 111, 113, 123, 169, 182, 183, 184, 185, 193, 194, 195, 204, 205.
Barrister, 110.
Bastardy, 103, 108, 117, 118, 119.
Battail, 64, 65.
Bond, 76, 82, 83, 101, 164, 195.
Brothel-houses, 34.
Buggery, 10, 11, 194.
Burglary, 12, 59, 60.

C

Certainty, 40, 41.
Challenge, 52, 60, &c. 66.
Champeon, 64, 65.
Chancemedley, 9, 102.
Chancery, 111.
Charter, 54.
Chattels, 19, 134, 204.
Cockpit, 153.
Commitment, 165, 166.
Common and Commoner, 180.
Condition, 41, 42.
Confirmation, 119, 120.
Contract, 42, 85. 168.
Coparceners, 135.
Copyhold, 154.
Costs, 8.
Counsellor and Client, 126.
Creation of a Gentleman, 191.

Customes, 130, 131.
Cutpurse, 32.

D

Deed, 147. 196.
Delivery, 147.
Demurrer, 144.
Deodand, 17.
Descent, 88.
Devise, 20, 74, 88, 94, 95, 178.
Discontinuance, 47, 48, 181.
Distress, 77, 157, 206.
Divorce, 4, &c. 113.
Dower, 133, 134.
Drinking, 95, 96.
Duel, 60, 61, 62, 63, &c. 66, &c.

E

Election, 201, 202.
Enrollment, 196.
Error, 78, 79.
Estate, 43.
Evidence, 109, 118, 183.
Exchange, 150.
Excuse, 44, 45.
Execution, 26, 27, 28, 46, 89, 90.
Executor, 189.
Extinguishment, 185, 188.

F

Felo de se, 24, 25

Felony, 4, 5, &c. 12, 14, 17, 18, 22, 23, 28 37, 58, 97,
Fine, 102, 151, 153.
Fine of Lands, 52, 121, 123, 124, 177.
Forfeiture, 106, 154.
Forgery, 75.
Formedon, 53.
Freehold, 43, 134.

G

Gift, 24, 76, 78.
Good Behaviour, 202, 203.
Goods, 22, 141, 148, 149.
Grants, 46, 47, 76, 86, 146, 175, 176.

H

Hangings, 186.
Heir, 19, 88, 135.

I

Ideot, 2, 3.
Jews, 114, 115.
Ignorance, Vide *the Preface*.
Indictment, 4, &c. 10, 11, 13, 23, 24, &c. 32, 33, 58, 150, 151, 158, 159, 160, 194.
Infant, 17, 52, 53, 56, 86, 97.
Intention, 85.
Joint-tenants, 133.
Judge, 50, 158, 159.
Judgment, 45, 46, 48, 49.
Jury, 74, 109.

Justification, 102, 103, 104, 139, 143, 167.
Justs, 64.

L

Law, Vide *Preface*, &c. 105.
Presumption of Law, 105, 106.
Lease, 39, 40, 41, 78, 119, 188.
Legacy, 18, 72, 73, 80, 87, 88, 94, 95, 141.
Livery of Seisin, 53, 54, 55, 77.
Lunatick, Vide *Non Compos Mentis*.

M

Manslaughter, 70, 71, 72, 92.
Market Overt, 142.
Marriage, 1, 2, 3, 4, 5, 108.
Master and Servant, 169, 171 172.
Masters in Chancery, 118.
Monk, 46. 47.
Murder, 70, 71, 121, 118, 119.

N

Names, 19, 81, 178, 179.
Night, 77.
Non Compos Mentis, 16, 25, 26.
Non Obstante, 75.
Nonsuit, 108.
Not Guilty, 200.
Nuisance, 153, 154.

O

Oath, 114, 116, 184.
Offences,

Offences, 96, 97.
Outlawry, 92, 93, 94, 107.

P

Patent, 159.
Payment, 185.
Pictures, 186.
Play, 132, 139, 140, 193.
Plea in Barr, 14, 134, 173.
Poſſeſſion, 173.
Practice, 83.
Prerogative, 112.
Preſentation, 189, 201.
Prince Committed, 165, 166.
Priviledge, 186.
Prohibition, 57, 116, 190, 204.
Promiſe, 195.
Property, 142, 189, 190.
Provocation to a Challenge, 66.

Q

Queen, 166.
Queen Dowager, 167.

R

Rape, 12, 13, 14, 15, 16.
Common Recovery, 122, 184.
Releaſe, 98.
Remainder, 20, 21, 107.
Remitter, 181.
Rent, 105, 145, 146.

Replevin, 155, 156.
Reversion, 47.
Rings, 128.
Robbery, 30, 31, 32.
Ropedancing, 153, 154.

S

Sheriff, 50, 91, 101, 198.
Simony, 187, 189.
Slander, 56, 86, 91, 148, 156, 160, 161, 162, 173, 174, 175, 186, 199, 200, 203, 204.
Sodomy, Vide *Buggery*.
Stews, Vide *Brothel-Houses*.
Surrender, 39, 40.

T

Tail, 136, 177.
Tenant in Common, 22, 136, 137.
Tenant by Curtesie, 99, 100, 149, 150.
Tender, 197.
River Thames, 84.
Trades, 82, 83, 158, 159.
Treason, 26, 29, 151, 152, 167.
Trespass, 43, 44, 57, 96, 97, 101, 103, 104, 139, 157, 169, 180.
Trick, 84.
Trover, 193.
Turnaments, 64.

V

Uncertainty, 40, 41, 45.
Voucher, 138.
Uses, 43.

W

Wife, 130, 168, 182, 183, 184, 185, 193, 204.
Will, 43, 130.
Witches, 18, 156, 157.
Witness, 124, 127, 128, 197.
Woman Bailiff, 24.
Words, 29, 30, 70, 71, 151, 152, 181.
Writ, 19.

Common

Common Law.

BEfore I come to particular Caſes, it may not be impertinent, I hope, to conſider a little what is meant by theſe Words the *Common Law*, perhaps not ſo commonly underſtood as imagined, ſince I find the Learned themſelves differ about them; and firſt let us ſee what is ſaid in *Doctor* and *Student*, *Lib.* 2. *cap.* 2. there you may obſerve that by the *Common Law* is underſtood ſuch things as were Law before any Statute made in that point that is in queſtion, ſo as that point was holden for Law by the general or particular *Cuſtoms* and *Maxims* of the *Realm*, or by the Law of Reaſon, and the Law of God, no other Law added to them by Statute, or otherwiſe. For Inſtance, It is ſaid that at the *Common Law* Tenant by the Curteſie, and Tenant in Dower were puniſhable for Waſte, *i. e.* that before any Statute of Waſte made, they ſhould be puniſhed for it by the Grounds and Maxims of the Law uſed before the Statute made in that point; But Tenant for Life or Years

Years were not punishable by the said Grounds and Maxims 'till remedy was given against them by Statute, and therefore 'tis said that at the *Common Law* they were not punishable for Waste.

Glanvil and *Bracton* affirm that the Law of *England* was *Jus non scriptum* in their times: And Sir *John Davies* says (in the Preface to his Reports) that our Ancient Reports of the Law are but Comments or Interpretations upon the *Text* of the *Common Law*, which *Text* (says he) was never originally written, but hath ever been preserved in the memory of Men, tho' no Man's memory can reach to the Original of it, for (goes he on) the *Common Law* of *England* is nothing else but the Common Custom of the Realm, and a Custom which hath obtained the force of a Law is always said to be *Jus non scriptum*, for it cannot be made or created either by Charter or by Parliament, which are Acts reduced to Writing, and are always matter of Record; but being only matter of Fact, and consisting in use and practice, it can be Recorded and Registred no where but in the memory of the People, for a Custom takes beginning and grows to perfection thus; when a reasonable Act once done is found to be good and beneficial to the People, and agreeable

able to their nature and diſpoſition, then do they uſe it and practice it again and again, and ſo by frequent iteration and multiplication of the Act, it becomes a Cuſtom, and being continued without interruption time out of mind, it obtains the force of a Law. So far Sir *John Davies*: But ſure what the Lord *Vaughan* lays down, *fol.* 163. is very conſonant to Reaſon, that in truth moſt of the Common Law cannot be conceived to be Law otherwiſe than by Acts of Parliament, or Power equivalent to them, whereof the Rolls are loſt, for always there was a Power and Practice of making new Laws: And again *fol.* 358. Many things are ſaid to be prohibited by the *Common Law*, and indeed moſt things ſo prohibited were primarily forbidden by Parliament, or by a Power equivalent to it in making Laws, which is the ſame, but are ſaid to be prohibited by the *Common Law*, becauſe the original of the Conſtitution or Prohibiting Law is not to be found of Record, but is beyond memory, and the Law known only from practical proceeding and uſage in Courts of Juſtice, as may appear by many Laws made in the time of the *Saxon* Kings, of *William* the Firſt, and *Henry* the Firſt, yet extant in Hiſtory, which are now received as *Common Law*.

So

So if by accident the Records of all Acts of Parliament now extant, none of which is elder than 9 *H.* III. (but new Laws were as frequent before as since) should be destroyed by Fire, or other Casualty, the Memorials of Proceeding upon them found by the Records in Judicial Proceeding, would upon like reason be accounted *Common Law* by Posterity.

A DOCTOR in PHYSICK Eminent for the CURE of all sorts of VENEREAL, SCORBUTICK, and DROPSICAL PERSONS, still lives in *Great Knight riders Street*, nigh *DOCTORS-COMMONS*, and of whom any Person may have Advice, and a perfect CURE, let his or her Disease be of the longest Date, and with the worst of SYMPTOMS. His HOUSE is known by a BLUE BALL over the DOOR.

THE

THE Young Lawyer's RECREATION.

Marriage.

A Man contracts with a Woman to Marry her, and after Marries another Woman, and the first Sues him in the Spiritual Court, and by Sentence there, his Marriage with the Second is adjudged void, and that He and the first Woman are Man and Wife: *Noy* was of Opinion (as Serjeant *Windham* said) that by this Sentence the Man and first Woman were complete Baron and Feme, without any other Solemnity: But this was denied by Justice *Twisden*, who said the Marriage must be Solemnized before they can be Man and Wife. 1 *Siderf.* 13. Sir *Robert Pain*'s Case.

So Note, The Spiritual Court may unmarry, *i.* dissolve a Marriage, but they cannot Marry by such Sentence, for *Matrimony* is not accounted consummate by our Law untill it be celebrated *in facie Ecclesiæ*, or, *&c.* by one in Sacred Orders, according to the Form in the Book of *Common Prayer.*

Two were Married by a *Parson* in Holy Orders during the time of the Act against Marriages by them, and which enabled Justices of Peace to Marry: The Justices of Peace upon Petition, dissolved this Marriage; but the whole Court now was of opinion, That the Marriage being once lawfully Solemnized, and without Impediment, the whole World could not dissolve it, being by one *in Sacred Orders*, tho' at an Ale-house, and at Twelve of the Clock in the Night. 1 *Siderf.* 64. *Tarry* and *Brown*'s Case.

Whether an Ideot may contract Matrimony.

THO' it be generally said, That the Contracts of Ideots are void, because such are natural Fools, yet it was adjudged, *Trin.* 3. *Jac. B. R.* in the Case of *Stiles* and *West*, that an Ideot may consent to Marriage, and his Issue shall be Legitimate. *Shep. Gr. Abr. tit.* Ideot, *&* 1 *Siderf.* 112. and by my Lord *Coke*, the Wife of an Ideot shall

ſhall be endowed. 1 *Inſt. Shep.* ſays there, If he have ſo much Knowledge that he can read, or learn to read by inſtruction and information of others, or can meaſure an Ell of Cloth, or Name the Days of the Week, or beget a Child, Son or Daughter, or ſuch like, whereby it may appear he hath ſome light of Reaſon, then he is no Ideot naturally; and cites for this *Terms Ley.* Some doubt if *Begetting* be any Evidence of Reaſon; what think you of an *Horſe* or an *Aſs* that beget, but moſt unreaſonably; ſay rather he can beget like theſe by Inſtinct, *Natural* perhaps to him as his *Folly. Conjunctio Maris & Feminæ eſt de jure Naturæ.* 1 *Inſt.* 187.

The Age of Conſent to Marriage.

A MAN cannot conſent to a Marriage before the Age of Fourteen, which are his Years of Diſcretion; but a Woman may conſent at Twelve, for the Law tenders the ſpeedy advancement of Women, *quia maturiora ſunt vota Mulierum quam Virorum.*

Note, If the Man be above Fourteen, and the Wife under Twelve, or if the Wife be above Twelve, and the Man under Fourteen, yet may the Husband or Wife ſo above the age of conſent, diſagree to the

Eſpouſals, as well as the party that is under the age of Conſent; for the Advantage of diſagreement muſt be reciprocal. *Babington* and *Warner*'s Caſe. 3. *Inſt.* 89.

Marriage in ſome ſort Felony by the Common Law.

By the ancient Law of *England*, if any *Chriſtian* Man did Marry with a Woman that was a *Jew*, or a *Chriſtian* Woman Marry with a *Jew*, it was Felony, and the Party ſo offending ſhould be burnt alive. 3 *Inſt.* 89.

Contrahentes cum Judæis, Judæabus, Pecorantes, & Sodomitæ in terra vivi confodiantur, &c. *Fleta lib.* 1. *cap.* 35. §. *Contrahentes.*

Whether a Man divorced from his Wife cauſâ Adulterii, *and Marrying a Second in her Life, be a Felon.*

One *Williams* Married a Wife, and was divorced from her *cauſâ Adulterii*, and then Married another, for which he was indicted upon the Statute of 1 *Jac. cap.* 11. for having two Wives: And if this were within the Proviſo of that Statute which provides for thoſe who are divorced, was the queſtion. [The Words are, *Provided that this Act ſhall not extend to any Perſon or Perſons*

Persons that are or shall be at the time of such Marriage divorced by any Sentence had, or hereafter to be had in the Ecclesiastical Court, nor to any Person or Persons where the former Marriage hath been, or hereafter shall be by Sentence in the Ecclesiastical Court, declared to be void, and of no effect.] 'Twas resolved by *Brampston* and *Heath*, (*cæteris absentibus*) that it is within the Proviso, for it speaks generally of Divorce, and this is a penal Law. *Heath* said, That by the Law of Holy Church the Parties divorced, *causâ Adulterii*, might Marry, but *Pars rea*, not without Licence; and cited the case of *Ann Porter* (which see *Cro. Car.* 461.2.3.) who was divorced from her Husband *causâ lævitiæ*, and afterwards Married one *Rooks*, and being indicted upon this Statute, it was doubted and debated whether it were within the Proviso or not; but resolved, It was not, because only a divorce *à Cohabitatione*, and a temporal Separation until the Anger pass'd; but the Divorce here is *à Vinculo Matrimonii*. *Trin.* 17. *Car. March Rep.* 101.

Quere the difference between these Cases, for tho' in former times it was questioned, Whether a Man and his Wife Divorced *causâ Adulterii* might Marry again, yet now it is made clear by the Canons, That they may not, for this is no abso-

lute Divorce, being *ex causâ subsequente*, and only a Separation *à Mensa & Thoro*, freeing the Parties from the performance of Conjugal duties only, the one with the other. *Vide Cro. Eliz.* 908. *Stephen*'s and *Totty*'s Case, and *Moor* 665. where the Husband after such a Divorce, *causâ Adulterii*, released an Obligation made to his Wife before the Coverture, and adjudged a good Release; which proves that the Coverture continues, and that there is no dissolution *à Vinculo*.

In the Case of *Ann Porter*, as reported by *Crook*, it was said by the Court, If she were suffered to be within the Proviso, many would be Divorced upon such pretence, *Scil. Causâ Sævitiæ*, and instantly Marry again, whereby many inconveniencies would ensue; whereupon she was advised, Not to insist upon the Law, but to procure a Pardon to avoid the danger; for it was clearly agreed by all the Civilians and others, that the Second Marriage there was unlawful, and she in danger to be adjudged a Felon by the Statute. Note the Decree was, *Quod propter Sævitiam* of her Husband towards her, she should be separated *à Mensâ & Thoro* from him; but no Word of *Divorciamus* was therein; and expressly intimated in the Sentence, that she should not marry to any other during the life of the said *Porter*.

It

It should seem therefore, that where Sentence of Divorce is given, as in the Case of *Williams, causâ Adulterii*, there such Persons Marrying again shall not be in danger to be Felons by the Statute, which being a Penal Law concerning Life, ought to be favourably expounded *in favorem vitæ*; and that the Proviso extends to this kind of Divorce *ex causâ subsequente, i. e. Adultery*, the Words being of Divorces in general, where Sentence is given in the Ecclesiastical Court, and not only where the former Marriage is by Sentence declared void. Yet some are of opinion, That the Proviso doth not intend, but when there is Sentence of an absolute Divorce, as in Causes preceding the Marriage, *viz.* Pre contract, Consanguinity, Affinity, and Frigidity, which dissolve *à Vinculo*, and the Marriage declared void *ab initio*. But *vide* 3 *Inst.* 89. and *Hales, Pla. Cor. tit. Felonies by Stat.* that this Branch of the Statute in respect of the generality of the Words, privelege the offender from being a Felon, as well in the case of the Divorce *à Mensâ & Thoro*, as where it is *à Vinculo Matrimonii*; and yet in the case of the Divorce *à Mensâ & Thoro*, the Second Marriage is void, living the former Wife or Husband. And if there be a Divorce *à Vinculo Matrimonii*, and the

adverſe Party appeal, which is a continuance of the former Marriage, and ſuſpend the Sentence; yet after ſuch a Divorce, the Party Marrying is no Felon within this Statute, in reſpect of the generality of this Branch, altho' the Marriage be not lawful.

The offender againſt this Statute may have the benefit of his Clergy. 3. *Inſt.* 89.

Where notwithſtanding one is acquitted, he ſhall be forc'd to pay Coſts.

If Baron and Feme are Sued in the Eccleſiaſtical Court for Polygamy, and there it appears that the Wife was Married before to *I. S.* within the age of Conſent, and afterwards at the Age of Conſent did diſagree, and Married the Defendant, and ſo the Defendants are acquitted; yet if the Court tax Coſts to the Plaintiff, no Prohibition ſhall be granted, becauſe they have Juriſdiction of the Cauſe, and it is the Cuſtom there to tax coſts where the Plaintiff has *cauſam litigandi*; and a Prohibition was denied. 2 *Rol.* 299. *Blackdon's* Caſe.

See 2. *Brownl.* 36. the ſame Caſe reported *contrà*, that a Prohibition was granted, for it was injuſtice to allow Coſts to one who had vexed them without cauſe, and when

when they had given Sentence againſt the Informer.

Chancemedly, or caſual Homicide.

It is where a Man doing a lawful act, without intent of hurt to another, happeneth to kill a Man caſually. By the Law of God there was a City of Refuge appointed for ſuch Perſon to flee unto, for the Act happening in ſuch ſort, ſeemeth to be the work of God himſelf. But by our Law he ſhall forfeit his Goods, in regard that a Subject is killed by his means.

Shooting at Rovers, or at a Bird, or hewing a Tree, and the Hatchet-head flies off, or a School-Maſter in reaſonable manner beating a Scholar, or a Father his Son, or a Maſter his Servant, and Death enſues, it is *Chancemedley. Dalt.* 351. 352. *Quære*, If a Man beat his Wife for Correction only, and ſhe die thereof.

King *William Rufus* was ſhot by accident in *New Foreſt* by Sir *Walter Tyrel*. And in the Reign of King *James* I. Arch-Biſhop *Abbot*, a Man of a holy and unblameable Life, (medling with edg'd Tools that he uſed not to handle in his Study) by a ſad accident killed a Keeper with a forked Arrow, as he was ſhooting at a Deer, where-upon he retired to *Guilford* in great per-

perplexity; but the King granted out a Commission to enquire whether casual Homicide did make the Arch-Bishop irregular, and in the disquisition of it, he found many Friends that restored him to his Palace. *Wilson's* King *James.* 198.

Buggery, or Sodomy.

BUGGERY is a detestable and abominable Sin, not to be named amongst *Christians*, committed by carnal Knowledge against the Ordinance of the Creator, and Order of Nature, by Mankind with Mankind, or with brute Beasts, or by Womankind with brute Beasts. 3 *Inst.* 58.

Bugeria is an *Italian* Word, and signifies this description; and it was complained of in Parliament that the *Lombards* (*Italians*) had brought into the Realm the shameful sin of *Sodomy*, *inter Christianos non nominandum*, as it is said *Rot. Parl.* 50 *E.* 3. *nu.* 58.

The words of the Indictment be, *Contra ordinationem Creatoris & naturæ ordinem, rem habuit veneream, dictumque puerum carnaliter cognovit*, &c. so as there must be *penetratio*, i. e. *res in re*, either with Mankind, or with Beast, but the least penetration maketh it Carnal Knowledge. See the Indictment of *Stafford*, *Coke*, *lib. Intr.* for committing Buggery with a Boy, for which he was attainted and hanged.

Emissio

Emissio Seminis makes it not Buggery; but is an Evidence in that case of penetration. 3 *Inst.* 59.

If the Party Buggered be within the age of discretion, it is no Felony in him, but in the Agent only. *ib.*

Note the Words of Stat 25. *H.* 8. *c.* 6. that makes this offence Felony, are, *No Person offending*, &c. which extends as well to a Woman as to a Man; and therefore if she commit Buggery with a Beast, she is a Person that commits Buggery with a Beast, to which end the Word *Person* was used, and the rather, for that somewhat before the making of this Act, a great Lady had committed Buggery with a Baboon, and conceived by it, *&c. ibid.*

And of late Years one *Hick*'s was Indicted at the old Baily upon this Statute having suffered a Dog to copulate with her, which being fully proved, and found by the Jury, she was condemned, and hanged at *Tyburn*, and the Dog on a Tree by. 3 *Keeble* 800.

See *Hutton's Rep.* 115. the Lord *Audley*'s Case. He was Indicted that *Deum præ oculis non habens, nec naturæ ordinem respiciens, sed instigatione Diabolicâ motus*, &c. *Vi & Armis in quendam* Florence Fitz-Patrick, *Teomon. insultum fecit, & cum eodem felonicè, & contra naturam rem veneream habuit, ipsumque*

ſumque F. &c. *carnaliter cognovit, peccatumq; illud Sodomiticum*, &c. *cum eodem* F. *commiſit*, &c. The like Indictment for the ſame offence, with the ſame Perſon at another time; and being tried by his Peers, Twelve of the Lords acquitted him, and Fifteen found him guilty; and ſo he had Judgment.

Felony, Rape, Burglary.

If a Woman kill a Man that aſſaults her to raviſh her, 'tis not Felony, becauſe he comes to commit a known Felony himſelf. *Hales, Pla. cor. tit.* Felonies.

If a Houſe be broken and enter'd with an Intent to commit a Rape, it is Burglary, whether the Intent be executed or not: *(Hales, tit. Burglary)* For note, Rape was Felony at Common Law; then by *Stat. Weſtm.* 1. *c.* 13. made but Miſdemeanor; then by 13 *E.* 1. *c.* 34. reſtored to Felony again.

Rape is a violent deflouring of a Woman, or carnal Knowledge had of the Body of a Woman againſt her Will.

If a Woman at the time of the ſuppoſed Rape do Conceive with Child by the Raviſher, this is no Rape; for a Woman cannot Conceive with Child, except ſhe doth conſent. *Dalton's Inſt. cap.* 160. *pag.* 392.

One

One *W. D.* was Arraigned in *Banco Regis* upon an Indictment of the Rape of a Girl of the age of Seven Years, *Scil. Quod ipsam felonicè rapuit & carnaliter cognovit*, he pleaded *Non Culp.* but was found Guilty upon the Evidence of ſeveral Matrons: But note, the Court doubted of a Rape in ſo tender a Child; but had ſhe been Nine Years old, and more, then it might be otherwiſe. *Dyer.* 304. *pla.* 51. *Poſt.*

(The Law is, That a Wife ſhall not be endowed, unleſs ſhe be paſt the age of Nine Years, at the time of the Death of her Husband, and the reaſon is *Quia Junior non poteſt dotem promereri neque virum Suſtinere. Co. Lit.* Sect. 36. (which perhaps was the ground of the Opinion in the former Caſe.)

One Woman Principal to the Rape of another.

If a Man and a Woman be preſent, with purpoſe that the Man ſhall by Violence carnally know the Body of another Woman there alſo preſent, againſt her Will, and the Man doth the fact in the preſence of the other Woman; ſhe being preſent ſhall be a Principal Raviſher as well as the Man; He the Agent, and She the Co-adjutant: And ſo one Woman may be a Principal to the Raviſhment of

of another. *Dod.* 138. *Dalton* 392. *cap.* 160.

To Raviſh a Harlot, Felony.

It is a good Plea in an Appeal of Rape to ſay, That before the Raviſhment ſuppoſed, ſhe was his Concubine, as *Bracton* ſays. And yet to raviſh an Harlot againſt her will is Felony; for *Licet Meretrix fuerit ante, certe tunc temporis non fuit, cùm nequitiæ ejus reclamando conſentire noluit. Bract. l.* 2. *Dalton ubi ſup.*

Conſent to Rape.

Note, Tho' if a Woman prove with Child, it is no Rape, for that ſhe cannot conceive unleſs ſhe conſent, as it was obſerved before; yet if a Man Raviſh a Woman, who conſents for fear of Death, this is Raviſhment againſt her Will, for that Conſent ought to be voluntary and free. *Dalton ubi ſup.*

To Raviſh a Woman where ſhe neither conſents before nor after; or to Raviſh any Woman with force, tho' ſhe do conſent after, is Felony, and the offender has no benefit of Clergy. *ibid.* 13 E. 1. 34. 6 R. 2. c. 6.

But

But if a Woman be under Ten Years, then, tho' ſhe do conſent before, yet by Stat. 18. *El. cap.* 7. it is a Rape. *Hales, tit. Felonies by Stat. Cromp.* 47. *Dalt.* 393.

By the Statute, 6 *R.* 2. *c.* 6. both the Raviſher and Raviſhed, where ſhe conſents after the fact, are diſſabled to have, or challenge any Inheritance, Dower, or Joint Eſtate, after the death of her Husband, or Anceſtor.

Note, Where Rape is, there muſt be *penetratio, & emiſſio Seminis* in the Caſe. *Co.* 12. 37. For altho' there be *emiſſio Seminis*, yet if there be no *penetration*, that is, *res in re*, it is no Rape; for the Words of the Indictment be, *Carnaliter cognovit*, &c. 3 *Inſt.* 60. But *emiſſio Seminis* may be an Evidence in caſe of Rape of Penetration. 3 *Inſt.* 59. See *Hutton's Rep.* 116. in the Lord *Audley's* Caſe.

At what Age a Woman may be Raviſhed.

THE doubt that was made in 14 *Eliz. Dyer, f.* 304. (*before*) at what age a Woman Child might be Raviſhed, was the cauſe of the making of the Act of 18 *Eliz. cap.* 6. for plain declaration of the Law [*That if any Perſon ſhould unlawfully know and abuſe any Woman-Child under the age of Ten Years, every ſuch unlawful and car-*

carnal Knowledge ſhould be Felony, and the offender therein being duly convicted, ſhall ſuffer as a Felon, without allowance of Clegry.] 3 *Inſt.* 60.

A Woman Attainted, Raviſhed.

If a Woman attainted be Raviſhed, after Pardon ſhe ſhall have an Appeal of Rape. 3 *Inſt.* 215.

We read in Story, that chaſt *Lucretia* being Raviſhed, ſhe was found in extream heavineſs, and it was demanded of her, *Salvan'?* She anſwered, *Quomodo Mulier ſalva eſſe poteſt læſâ Pudicitiâ?* And yet thereof it is truly ſaid, *Duo fuerunt, & unus commiſit Adulterium.*

Non compos Mentis.

A Man *Non ſanæ Memoriæ* gives to himſelf a mortal Wound, and before he dies, he becomes of ſound Memory, and after dies of this Wound; here he ſhall not be *felo de ſe*; but if one gives himſelf ſuch a Wound while he is of ſound Mind, and after becomes *non ſanæ Memoriæ*, and dies thereof, there he ſhall be *felo de ſe.*

Deo-

Deodand.

If a Man fall from a Ship, Cart, or other Veſſel, *in aqua dulci*, freſh Water, 'tis a Deodand; otherwiſe in ſalt Water, being any Arm of the Sea, tho' it be in the body of the County; becauſe of the dangers it is ſubject to upon the raging Waves in Windy and Tempeſtous Weather. 3. *Inſt.* 58.

If an Infant within the age of diſcretion, *ſcil.* Fourteen, be ſlain by a fall from a Cart, Horſe, Mill, *&c.* no Deodand; but if ſlain by a Horſe, Bull, or, *&c.* then a Deodand. *ibid.*

A Lodger kills one that aſſaults a Houſe, no Felony.

If one break a Houſe with intent to rob it, or kill any therein, and one within the Houſe, tho' not the Maſter, (but a Lodger, or a Sojourner) kill him; this is no Felony. *Cro. Car.* 544. *Cooper's* Caſe.

Phyſician kills his Patient.

If one that is no Phyſician allowed, take upon him to give Phyſick, and kill his Patient, this is Felony; but if he be a Phyſician

ſician allowed, and do ſo out of Ignorance or Negligence, *Contra. Stamf. lib. 1. pag. 16. Fitz. Coron. 163.*

To provoke Love by Witchcraft, the Second offence Felony.

If one ſhall the Second time uſe any Conjuration, or Witchcraft, to provoke Love in a Maid, this will be Felony, by *1 Jac. cap. 12.*

Servant kills one that hath killed his Maſter.

If one hath killed my Maſter, and I in a haſty and freſh purſuit of him, kill him, no Felony. *Kytch.* 25. If he be a Thief, *21 H. 7. 41.*

Two Perſons of the ſame Name pretend to a Legacy.

If there be a diſpute between two Perſons pretending to the ſame Legacy; as if the Deviſe be to *Thomas Styles*, without other diſtinction of the Perſon, and there be two of that Name, of equal reſpect with the Teſtator, or both alike, his Friends, or Acquaintance; here the Executor hath his election to deliver the Legacy to which of them he pleaſe. Yet

ſome

ſome are of opinion, that in ſuch caſe the Legacy is void by reaſon of uncertainty. *Orphan's Legacy* 441. 10.

Faith and Troth.

A WRIT was *ad Reſpondendum* I. S. *& Fidei Uxori ejus.* The Defendant pleaded in Abatement of the Writ, becauſe the Name of the Wife was *Faith* in *Engliſh*, and pretended it ſhould be *Fidi*. *Rhodes* ſaid, he knew a Wife who was called *Troth*, and Named *Trothia* in *Latin*, and well: And the Writ was adjudged good in the former Caſe. *Goldsb. Rep. fol.* 86.

Where Chattels ſhall go to the Heir.

SEE ſome inſtances hereof in *Dr.* and *Stud. lib.* 2. *cap.* 12. and 1 *Inſt.* 8. *a.* in fine. 18. *b.* in med. and 185. *b.* fine, and the office of an Executor 81. and 84.

If a Man be ſeized of a Houſe in Fee, and a Window or Door of the Houſe be taken off to be mended, during which the owner of the Houſe dies, yet his Heir ſhall have them by deſcent, and not the Executors; for tho' in fact they are for a time divided from the Houſe, yet in judgment of Law they always remain parcel of it. 1 *Rol. Rep.* 102.

Deviſe good to him in Remainder, tho' the particular Tenant die before the Teſtator.

ALTHO' where a Legatary dies before the Teſtator, a Bequeſt of Goods or Chattels to ſuch Legatee becomes void to his Executors; yet if there be a Deviſe of Land to one for Life, the Remainder to another in tail, and the Deviſee for Life die before the Teſtator, the Deviſe of the remainder continues good. See *Perk. Sect.* 567, 568.

Where a Remainder may depend without a particular Eſtate.

A LEASE is made to *A.* for the Life of *B.* the remainder to *C.* in Fee; *A.* dies, now before an Occupant enters, here is a Remainder without a particulur Eſtate, and yet good. 1. *Inſt.* 298. *a. in medio.*

Which Caſe diſproves the opinion of Juſtice *Clinch. Owen's Rep.* 39. *viz.* That every Occupant ought to be in poſſeſſion at the time of the death of the Tenant, and that otherwiſe the Law caſts the Intereſt upon him in the Reverſion; which opinion is there likewiſe denied by *Gawdy* and *Cbute* Juſtices: And as my Lord *Coke* ſays, He is in Law called an *Occupant*, becauſe his Title is by his firſt Occupation, (which ſure cannot be ſuppoſed in the time of the particular Tenant) A Remainder is de-

fined

fined to be the reſidue of an Eſtate in Land, depending upon a particular Eſtate, and created together with it, yet as it may in ſome caſe depend without a particular Eſtate: So the continuance of the particular Eſtate is not always requiſite to ſupport the Remainder; as if a Leaſe be limitted to an Infant, the Remainder over, and after the Infant refuſes, yet the Remainder is good. So if a Copy-holder in Fee ſurrender to the uſe of the Lord for Life, the Remainder over; So if Tenant for Life, and he in the reverſion, grant their Eſtate to the Tenant himſelf for Life, the Remainder over, it is good. 1. *Siderf.* 360.

A Remainder veſting in an Inſtant, yet good.

A RENT is granted to the Tenant of the Land for Life, the Remainder in Fee, this is a good Remainder, tho' the particular Eſtate continued not, for *eo inſtante* that he took the particular Eſtate, *eo inſtante* the Remainder veſted, and the ſuſpenſion in Judgment of Law grew after the taking of the particular Eſtate. 1 *Inſt.* 298. *a. in medio.*

A Rent is granted to *B.* for the Life of *A.* the Remainder to the Heirs of the Body of *A.* this is a good Remainder, and yet it muſt veſt upon an inſtant. 7 *H.* 4. 6. immediately upon the Death of *A.* who is

veſtuy que vie, the Remainder veſts in his Heir. See *Finch's Law*. 69.

Tenants in Common.

LEASE for Life, Remainder to the right Heirs of *I. S.* and *I. D.* who are living, their Heirs ſhall take it in common; not Jointly, for that they cannot take at the ſame time, for by intendment both Fathers will not die together. 18 *E.* 3. 28.

Felonious Taking.

A. SEEING the Horſe of *B.* in his Paſture, and having a mind to ſteal him, comes to the Sheriff, and pretending the Horſe to be his own, obtains him to be delivered unto him by a Replevin; yet this is a Felonious and Fraudulent taking, for the Replevin was obtained in *fraudem Legis*. 3 *Inſt*. 108. 1 *Siderf*. 254.

Felony to take his own Goods.

A MAN delivers Goods to another, and afterwards the Bailor privately ſteals them from the Bailee, with an intent to charge him, *&c.* this is Felony, and in judgment of Law he is ſaid in this caſe to take the Goods of another, the Bailee having *Jus poſſeſſi-*

poſſeſſionis, or a ſpecial property; and the Bailor *Jus Proprietatis*. 3 *Inſt.* 110. *Keilway* 70. *Ha. Pl. Cor.* 67.

One *Farr* a Solicitor had obtain'd Judgment againſt the caſual Ejector, upon which he ſued an *Hab. fac. poſſeſſionem*, and the Sheriff's Bayliffs entred the Houſe with him, and broke a Door where certain Goods were, and took the Woman to whom they belonged, and required ſpecial Bail of her, for default whereof they carried her to *Newgate*, and then *Farr* took the Goods, which were of a great Value: For which being Indicted, and it appearing he did all this with intention to take the Goods, without any colour of Title for his Client, he was found guilty of Felony; and tho' he was a Solicitor, and had been convicted of Forgery before, yet he could not read, and ſo he was hanged. 1 *Sid.* 254.

Felony to ſteal a Winding-Sheet.

One *William Haines* digged up the ſeveral Graves of three Men and one Woman in the Night, and took their Winding-Sheets from their Bodies, and buried them again: 'Twas reſolved, The property of the Sheets remained in the owner, *ſcil.* in him (or them) who had property therein when the dead Body was wrapped therewith (*viz.* the

Executors, Adminiſtrators, or other owner of 'em) *vide* 11. *H.* 4. If Apparel be put upon a Boy, it is a gift in Law, 'cauſe the Boy hath capacity to take it; but a dead Body being but a lump of Earth, hath no capacity: Alſo it is no gift to the Perſon, but beſtowed on the Body for the reverence towards it, to expreſs the hope of Reſurrection: Beſides, one cannot relinquiſh the Property he hath to his Goods, unleſs they are veſted in another. Note, *Haines* had his Clergy, and eſcaped death. *Co.* 12. 113. and 3 *Inſt.* 110.

Woman Bailiff.

A Woman may be ſued in Account as Bailiff, for ſhe may well diſcharge the Office of a Bailiff. 19 *H.* 6. 5. *b.*

Felo de ſe, yet the killing involuntary.

A. Gives *B.* ſuch a Stroak, as he fells him to the Ground; *B.* draws his Knife, and holds it up for his own defence, *A.* in haſte meaning to fall upon *B.* to kill him, falls upon *B*'s Knife, whereby he is wounded to death; he is *felo de ſe*, for *B.* did nothing but what was lawful in his own defence. 3 *Inſt.* 54. *Ha. Pl. Cor.* 28. and *Bac. Elem.* 4.

So

So if a Gun be diſcharged with a murtherous intent at *I. S.* and the Piece break, and ſtrike into the Eye of him that diſchargeth it, and killeth him, he is *felo de ſe*, and yet his intention was not to hurt himſelf, but *in criminalibus ſufficit generalis malitia intentionis cum facto paris gradus*, for if one perſwade another to kill himſelf, and is preſent when he doth ſo, he is a Murtherer: But *Quæræ*, If *A.* lay impoiſoned Fruit for a Stranger, and his Father or Mother come and eat it, Whether this be petty Treaſon, becauſe it is not altogether *Crimen paris gradus. See Bacon's Elem.* 59, 60.

A Non compos mentis *wounds himſelf mortally, and dies* Compos.

One during the time that he is *Non compos mentis*, gives himſelf a mortal Wound, but dies not thereof till he has recovered his memory, he is not *Felo de ſe*, becauſe the Stroak which cauſed his death was given when he was not *compos mentis*, *Et Actus non facit Reum, niſi mens ſit Rea.* 3 *Inſt.* 54.

A Man that is *Non compos mentis* kills another, this is no Felony; the ſame for a *Lunatick* during his Lunacy. But Note, He that incites a Madman to kill another, is a Principal *Murderer.*

A

A Non compos mentis *can't commit Treason.*

THE ancient Law was, that if a Madman had killed, or offered to kill the King, it was Treason. 4 *Rep.* 124. (*Nec veniam læso numine casus habet.* Ovid.) But now by Stat. 25. *E.* 3. by force of these Words, *Fait compasser ou imaginer la mort.* He that is not *Compos Mentis*, and totally deprived of all compassings and imaginations, cannot commit High Treason by compassing, *&c.* 3 *Inst.* 4. 6.

Where Execution was done upon a Man for the death of a Child, the Child being then alive.

IN the County of *Warwick* there were two Brethren, the one having Issue a Daughter, and seized of Lands in Fee, devised the government of Her, and his Lands, until she came to Sixteen Years, to his Brother, and died. The Uncle brought up his Neece very well both at her Book and Needle, and she was eight or nine Years old: Her Uncle for some offence correcting her, she was heard to say, *Oh good Uncle kill me not*; after which time she could not be heard of, tho' much enquiry made: Whereupon the Uncle being suspected of her Murder, and the rather because her next

next Heir was upon Examination. 8 *Jac. Regis* committed to Goal for ſuſpicion of Murder, and admoniſhed by the Juſtices of Aſſize to find out the Child, and ſo bailed him until the next Aſſizes: Againſt which time, (for that he could not find her) and fearing what would fall out againſt him, took another Child as like unto her both in Perſon and Years as he could find, and apparelled like the true Child, and brought her the next Aſſizes; but upon view and examination, ſhe was found not to be the true Child, and upon theſe preſumptions he was Indicted, found Guilty, had Judgment, and was Hanged. But the truth of the caſe was, The Child being beaten over night, the next morning when ſhe ſhould go to School, ran away into the next County, and being well Educated, was received and entertained of a Stranger; and when ſhe was Sixteen Years old, at which time ſhe ſhould come to her Land, ſhe came to demand it, and was directly proved to be the true Child. Herein is a double caveat; Firſt, to Judges, that in caſe of Life they judge not too haſtily upon bare preſumption. Secondly, to the innocent Man, that he never ſeek to excuſe himſelf by falſe or undue means, leſt thereby offending God he overthrow himſelf as the Uncle did. 3 *Inſt.* 232.

A Non compos mentis *ſhall not ſuffer Execution for Felony or Treaſon*, &c.

If a Man commit Treaſon or Felony, and confeſſes the ſame, or be thereof convict, and after become *De non ſanæ Memoriæ*, he ſhall not be called to anſwer: Or if after judgment he become *De non ſanæ Memoriæ*, he ſhan't be executed, for it cant be an Example to others. 3. *Inſt.* 4.

In Felony the Will was anciently taken for the Deed.

A Youth was arraigned, for that he would have ſtollen the Goods of his Maſter, and came to his Maſter's Bed where he lay aſleep, and with a Knife attempted with all his force to have cut his Throat, and thinking he had indeed done it, he fled; whereupon the Maſter cried out, and his Neighbours apprehended the Youth, and all this Matter being found by ſpecial Verdict, in the end he was adjudged to be hanged. 3 *Inſt.* 5. *Quia voluntas reputabitur pro facto.* But Note, For a bare compaſſing or plotting the death of a Man, either by Word or Writing, he ſhould not have died, but there muſt have been an overt deed tending to the execution of his

his compaſſing, as in the caſe aforeſaid. *ibid.*

If one beat another grievouſly, and leave him for dead, and he recover; this is not Felony now.

Words not Treaſon unleſs ſet down in Writing.

SINCE the Stat. of 25 *E.* 3. divers latter Acts of Parliament have ordained, that compaſſing by bare Words or ſayings ſhould be High Treaſon, but all they are either repealed or expired. And it is commonly ſaid, That bare Words may make an Heretick, but not a Traytor, without an overt Act. And the wiſdom of the makers of Stat. 25 *E.* 3. would not make Words only to be Treaſon, ſeeing ſuch variety amongſt the Witneſſes are about the ſame, as few of them agree together. But if the ſame be ſet down in Writing by the Delinquent himſelf, this is a ſufficient overt act within this Stat. Note the Act ſays, *per overt fait*, *per apertum factum*, and not *per apertum dictum*. 3 *Inſt.* 14.

Cardinal *Pool*, although a Subject to *H.* VIII. and of the King's Blood, (being deſcended from *George* Duke of *Clarence*, Brother to King *Edw.* IV.) yet in his Book of the Pope's Supremacy, written about 27 *H.* 8. incited *Charles* the Emperour, then prepa-

ring

ring againſt the *Turk*, to bend his Force againſt his natural Sovereign Lord and Countrey; the *Writing* of which *Book* was a ſufficient overt act within this Statute: and to move the Emperor the more, he made *H.* VIII. almoſt as ill as the *Turk*, in theſe Words, *In Angliâ ſparſum nunc eſt hoc ſemen, ut vix a Turcico internoſci queat, idque authoritate unius coaluit. ibid.*

But Words without an overt deed are to be puniſhed in another degree, as in High Miſpriſion, *ibid.* which is impriſonment during life, forfeiture of all Goods, Debts, and Duties for ever, and the Profits of his Lands during his Life. 3 *Inſt.* 36.

Robbery.

If a Theif command one to deliver his Purſe, who does accordingly, and then the Thief finding little in it delivers it back to him, this is Robbery.

If the true Man's Purſe be faſtened to his Girdle, and the Thief cut the Girdle, whereby the Purſe falls to the Ground, this is no taking to make it Robbery, for the Thief had never any Poſſeſſion thereof; but if the Thief take up the Purſe, tho' he let it fall again, (as in ſtriving or, *&c.*) it is robbery, tho' he never take it up more, for he had it once, and the con-

continuance of his poſſeſſion is not required by Law.

If the true Man ſeeking to eſcape, for the ſafeguard of his Money, caſt it into a Buſh, which the Thief perceiving, takes it, this is a taking in Law from the Perſon, becauſe done at one time.

So if the true Man had let fall his Hat, or thrown off his Coat, and the ſame lying in his preſence, a Thief aſſault him, and take the Hat, *&c.* this is Robbery, for that which is taken in his preſence, is in Law taken from his Perſon.

If a Thief compel the true Man by fear to ſwear to fetch him a ſumm of Money, which he does accordingly, and the Thief receives it, it is Robbery; for the Oath and Fear continuing, made him bring the Money, which amounts to a Taking in Law.

Note, Tho' it be under the value of Twelve Pence that is taken (as ſuppoſe One Penny, or Two Pence) it is Robbery; but ſomewhat muſt be taken, for the Aſſault only to Rob, without taking ſome Money or Goods, is no Felony, and ſuch Opinions as ſeem to the contrary, were mained by that, which then was anciently holden, *Quod voluntas reputabatur pro facto.*

Nota, Taking a Man's Goods out of his Shop before his Face is Robbery, as if he had taken it from the Person; and it is nothing to the purpose tho' the Thief say, *I have right to this*, or, *This is mine*, if indeed he has no colour.

Felonious taking of Goods to the value of 5 *s.* in the Day time, out of any Dwelling-House, or out-House, tho' no Person be within; *ouſt* of Clergy *per Stat.* 39 *El. cap* 15.

See these several Cases in 3 *Inſt.* 68, 69. and *Hales Pl. Cor. tit. Robbery.*

Cut Purſes, their Nature and Puniſhment.

Both *Cut-Purſe* and *Robber* take from the Person, but the former takes it *Clam & Secretè*, without assault or putting in fear; and the Robber by violent Assault, and putting in fear.

If one cut a Purse with Money in it, above Twelve Pence, he shall be hanged, and the benefit of Clergy is taken from him. 3 *Inſt.* 68.

Give me leave to acquaint you here with an odd accident that happened in *Northamptonſhire* towards the end of the Reign of King *James* I. out of *Wilſon*'s History, *pag.* 279. One *Harman*, a rich Man, having some bad Tenants, and being informed that one of

of 'em which owed him Money, had furniſhed himſelf to go to a Fair, walked (as by accident) to meet him in the way thither; when he ſaw his Tenant, he asked him for the Rent; the Man (willing to diſpoſe of his Money otherwiſe) denied he had any; *yes, I know thou haſt Money,* ſaid *Harman,* (calling him by his Name) *I prithee let me have my Rent,* and with much importunity the Man pull'd out his Money, and gave all, or the moſt part of it to his Landlord. This coming to ſome pragmatical Knowledge, the poor Man was adviſed to indict his Landlord for Robbing him on the High-way, which he did, and *Harman* for his lordid carriage being ill beloved in the Country, was found Guilty, but reprieved by the Judges, and hearing the Lord Treaſurer had a Secretary of his Name, applied himſelf to him, promiſing to give him all his Eſtate (having no Children) if his Lord would bring him out of the danger he was in, which by his power with the King he did, and the Secretary within a ſhort time after, by the others death, enjoyed an ample Eſtate.

Stewes, and Brothel-Houſes.

KING *Henry* VIII. ſuppreſſed all the Stews or Brothel-Houſes, which long had continued on the Bank-ſide in *Southwark*, and thoſe infamous Women were not buried in Chriſtian Burial when they were dead, nor permitted to receive the rites of the Church whilſt they lived. This was by Proclamation under the Great Seal, 30 *Martii* 27 *H* VIII.

Before the Reign of *H.* VII. there were Eighteen of theſe Houſes, and that King for a time forbad them: But afterwards Twelve only were permitted, and had Signs painted on their Walls; as *The Cardinal's Hat, The Boar's Head, The Croſs Keys*, &c. *Stow.* and 3 *Inſt.* 205.

Many wicked and common Women had ſeated themſelves in a Lane called *Water-Lane*, next to the Houſe of the Friers *Carmelites* in *Fleet-ſtreet*; this being known, King *Edw.* III. to the end theſe *Friers* might perform their Vows, one of which was, *To live in perpetual Chaſtity*, took order for removing of theſe Women. *ibid.*

So odious and dangerous was this Vice, (the faireſt end whereof is Beggery) that Men in making of Leaſes of their Houſes did add an expreſs Condition, That the Leſſee

Leſſee, *&c.* ſhould not ſuffer, harbour, or keep any *Feme putiene* within the ſaid Houſes. *ibid.* 206.

Nota, Tho' *Adultery* and *Fornication* be puniſhable by the Eccleſiaſtical Law, yet the keeping of a Bawdy-Houſe, being as it were a Common Nuſance, is puniſhable by indictment at the Common Law, by Fine and Impriſonment. *ibid.*

Acceſſary.

If *I. S.* counſel or command one to kill a Man, and he kill another; or to burn one Man's Houſe, and he burn another's; or to ſteal a Horſe, and he ſteal a Cow; or to ſteal a black Horſe, and he ſteal a white one; or to ſteal a Goldſmith's Plate from him, going to ſuch a Fair, and he go to his Shop in *Cheapſide*, and rob him there, and break open his Houſe to do it; in theſe Caſes the Counſellor ſhall not be Acceſſary, becauſe this is another Felony. *Plowd.* 475.

But if one command a Felony, and it be done in another Faſhion, Time, or Place only than it was commanded, he may be Acceſſary to it.

As if one bid another to rob *I. D.* on *Shooters*-Hill, and he does it on *Gads*-Hill; or to rob him one day, and he does it a-

nother day; or to do it himſelf, and he does it by another; or to kill him by Poyſon, and he does it by a Sword; in all theſe Caſes he ſhall be an Acceſſary. *ibid.* See *Stamf.* 1. 45.

If one counſel a Woman to murder the Child in her Body, and after the Child is born alive, and then ſhe murders it in the abſence of him that gave her the Counſel; in this caſe he is an Acceſſary. *Dyer* 186. *Plowd.* 475.

One *Saunders* had Poyſon given him by another to poyſon his Wife; the Husband gave it to his Wife in a roaſted Apple, who eat part of it, and gave the reſt to her Daughter being an Infant; the Wife recovered, but the Child died; and it was held, That he that gave it for the Wife was not acceſſary to the murder of the Daughter: For the Conſent muſt not be extended farther than it was given. *Plowd.* 474. *Saunder's* Caſe.

Yet if I perſwade or command one to go and beat another Man only, and he do beat him, and kill him; by this I am made Acceſſary not only to the Beating, but to the Murder, for I commanded the unlawful Act which cauſed his death. So it is *Murder* to kill one, tho' the Malice be againſt another; as if I ſtrike at *A.* and kill *B.* becauſe I had a malicious and felonious intent.

Felony

Felony to cut out Tongues, Eyes, &c.

BEFORE the Statute of 5. *H.* IV. *cap.* 5. which makes it Felony to cut out the Tongue, or put out the Eyes of any of the King's Subjects, of malice prepenſed, the miſchief was, that when one had been beaten, wounded or robbed, the Miſdoers, to the end the Party grieved might not be able to accuſe them, cut out their Tongues, or put out their Eyes, pretending the ſame to be no Felony, which is therefore ordained and eſtabliſhed to be ſo by this Act, which has ſo terrified offenders, that where before it was every days practice, now it is very rarely done. See 3 *Inſt.* 62.

It extends not to cutting off *Ears*, which is no Felony, as appears by the Stat. of 37 *H.* VIII. *cap.* 6.

The offender had the benefit of his Clergy, but that is now taken away by Stat. 22 and 23 *Car.* II. *cap.* 1. which enacts that if any Perſon, on purpoſe and of malice fore-thought, and by lying in wait, ſhall unlawfully cut out, or diſable the Tongue, put out an Eye, ſlit the Noſe, cut off a Noſe or Lip, or cut off, or diſable any Limb or Member of any Subject of his Majeſty, with intention in ſo doing to Maim or Diſfigure him in any of theſe Manners,

he is declared a Felon, without benefit of Clergy: But Note, by this Act it is provided, that he shall forfeit neither Lands, Goods, or Chattels.

The cutting off a Man's Privy Members was Felony by the Common Law, for *Bracton lib.* 3. *fol.* 144. *b.* says, *Quid dicitur si quis alterius virilia absciderit, & illum libidinis causa vel convitii castraverit? tenetur sive hoc volens fecerit vel invitus, & sequitur pœna aliquando capitalis, aliquando perpetuum exilium cum omni bonorum ademptione.*

Agreeable to this is the Record in *Bracton*'s time, *viz. Henricus Hall & A. uxor ejus capti & detenti sunt in Prisonâ de* Evilchester, *eo quod rectati fuerunt quod ipsi absciderunt virilia* Johannis Monachi, *quem idem* Henricus *deprehendit cum prædictâ* A. *uxore ejus*, &c. But *Fleta* says, *lib.* 1. *cap.* 38. *Si quis Castratus fuerit, talis pro Mahemiato poterit adjudicari.* And so was the Law holden in my Lord *Coke*'s time, as he says, 3 *Inst.* 63. and 118.

Where an Attaint lies, tho' every word of the Verdict be true.

A Man shall have an Attaint in some special Case where every Word of the Verdict is true: As if one hath had Common Appendant to his Land, time out of mind, and

and brings an Aſſiſe of the Common, and makes Title that he hath had Common time out of mind, *&c.* without ſpeaking of the Appendancy, and it is found for him. The Defendant ſhall have an Attaint, for the Plaintiffs Title is for Common in Groſs, and not Common Appendant; yet the words of the Verdict are true, that he hath had Common time out of mind, *&c.* but not in ſuch manner as ſhall be taken by the Title. *Fitzh. N. B.* 107 *A.*

So if one hath a Rent as Forreſter in Fee of ſuch a Forreſt, time out of mind, and in Aſſiſe he makes Title that he hath had a Rent out of that Land time out of mind, *&c.* without ſaying *As Forreſter in Fee, &c.* and it is found for him, the other ſhall have an Attaint, tho' the Words of the Verdict be true, for he hath not had ſuch Rent by preſcription as ſhall be intended and taken by the Title he has made. *ibid.*

Where the taking of a Second Leaſe ſhall be no preſent Surrender of a former.

A LESSEE for 21 Years took a Leaſe of the ſame Lands for 40 Years, to begin immediately after the death of *I. S.* it was holden, that the ſame was not any preſent Surrender of the firſt Term, but if

I. S. die within the term, then it is a Surrender, for it may be he will ſurvive it. 4 *Leon.* 30.

Surrender of Part.

A LESSEE for years of Land accepts a new Leaſe by Indenture of part of the ſame Land, it is a Surrender only for this part, and not for all. *Fiſh* and *Campion's* Caſe. 2 *Roll.* 498. the laſt Caſe.

A Leſſee for years grants all his Eſtate to the Leſſor, excepting one day at the end of the Term, yet this is not any Surrender, for this day is a Reverſion, and ſo ſhall hinder the Surrender as ſtrongly as if it had been 20 Years; adjudged between *Bacon* and *Waller.* 2 *Roll.* 498.

Where there may be a Certainty in an Uncertainty.

THERE is a Maxim in Law, That no Diſtreſs can be taken for Services that are not put into Certainty, or may be reduced to it, becauſe upon the Avowry, Damages cannot be recovered for what neither has nor can be reduced to any Certainty: Yet in ſome Caſes there may be a Certainty in Uncertainty, as one may hold of his Lord to Shear all the Sheep depaſturing

depaſturing within the Lord's Mannor, which is certain enough, tho' he has ſometime a greater number, and ſometime a leſſer there, yet this uncertainty being referred to the Mannor which is Certain, the Lord may deſtrain for it. 1 *Inſt.* 96. *a.*

A Leaſe for 21 Years if *I. S.* live ſo long, is a good Leaſe for Years, yet is certain in uncertainty; for the Life of *I. S.* is uncertain. 1 *Inſt.* 45. *b.*

Condition Broken.

If *A.* be obliged to permit *B.* to have ingreſs into his Houſe, he ought to have a common entrance at the uſual door, and ſhall not be put to enter at a Hole, a back-Door, or a Chimney: And if they leave the common Door open, and make a Ditch, ſo that *B.* cannot enter without skipping; the condition is broken. So if I am obliged to ſuffer *I. S.* to have a way over my Land, and when I ſee him coming, I take him by the Sleeve, and ſay to him, *Come not there, for if you do, I will pull you by the Ears,* the Condition is broken. *Latch.* 47.

Note, One made a Leaſe of a Houſe with free liberty of ingreſs, *&c.* through part of the Leſſor's Houſe, and 'twas ruled, That in this Caſe the Leſſee muſt keep

keep good hours and the Lessor is not bound to leave the Doors open for his coming in at One or Two of the Clcok at Night, but may shut up his Doors. *Modern Rep.* 27.

Contract.

THE Lady *Kent* Articled with Sir *Edward Herbert* that he should come to her when she sent for him, and stay with her as long as she would have him, to which he set his Hand: Then he Articled with her, that he should go away when he pleased, and stay away as long as he pleased, to which she set her Hand. This (says *Selden*) is the Epitome of all the Contracts in the World, betwixt Man and Man, betwixt Prince and Subject, they keep them as long as they like them, and no longer.

Conditional Bargain.

I. S. SENT a Letter by a Carrier to a Merchant for certain Merchandizes to send them to him, receiving for them a certain Summ of Money; the Merchant sent the things by the Carrier without receiving the Money: The Court held the Buyer should not be charged for the Money, for it was a conditional Bargain, and

and the folly of the Merchant to truſt the Carrier with the Wares. 4 *Leon.* 7. *May's* Caſe.

An Eſtate for Life determinable at Will.

If the King grant an Office to one at Will, and grant him a Rent for the exerciſe thereof for the term of his Life; this is determinable upon the determination of the Office. 1 *Inſt.* 42. *a.* *Finche's* Law 8. 9.

Two Uſes in Eſſe of the ſame Land at the ſame time.

If *A.* diſſeiſe one to the uſe of *B.* and *A.* bargains and ſells the Land for Money to *C.* *C.* hath an Uſe, and here be two Uſes of one Land, but of ſeveral Natures, the one, *viz.* upon the Bargain and Sale to be executed by the Statute 27 *H.* VIII. and the other not. 1 *Inſt.* 271. *b.* 272. *a.*

Where one ſhall be puniſhed in Treſpaſs for hurting a Man, that ſhall not be puniſhed for killing a Man.

Felony muſt be done *Animo Felonico*, and therefore if a Lunatick kill a Man, 'tis no Felony, becauſe he is *ſine Animo* during

ring his Lunacy: However, if a Lunatick hurt a Perſon, he ſhall be anſwerable in Treſpaſs, which tends only to give damages according to hurt or loſs, and therefore no Man ſhall be diſpenſed with for a Treſpaſs; (for this is the nature of an Excuſe, and not of a Juſtification, *prout ei benè licuit)* except it may be judged utterly without this Fault, as if one by force take my Hand, and ſtrike you, *&c. Hob.* 134. *Weaver* and *Ward.*

Caſes of Excuſe.

ALL Laws admit certain Caſes of juſt Excuſe when they are offended in Letter, where the Offender is under neceſſity either of Compulſion or Inconvenience, or elſe where he is under an invincible Ignorance, or where the offence is by a meer Misfortune without Will or Purpoſe, or where there is a meer Impotency to that that is required: By *Compulſion*, as in the caſe of *Lucretia* with young *Tarquin*, of whom St. *Auſtin* ſays, *Duo fuerunt, & unus commiſit Adulterium*; and thereupon makes the *Dilemma*, *Si caſta, quare trucidata? Sin minus, quare laudata?* Neceſſity of avoiding greater Inconvenience, as where one kills a Thief, or a Burgler in defence of his Perſon or Houſe; the binding and beat-

beating of a Perſon Lunatick; removing of a Perſon Leprous. In *Ignorance*, as in the caſe of *Jacob* and *Leah*: Such alſo is the excuſe of a Deed read amiſs to one that cannot read, or reported to one that is blind: Lunacy in him that kills a Man. Of *Impotency*, as in the caſe of *Mephibo-ſheth* accuſed by his Servant *Ziba* to *David*, and by himſelf excuſed by his *Impotency*. *Vide Hob.* 96.

Uncertainty.

A Lease is made to a Man and a Woman for their Lives upon condition, that which of them two ſhall firſt Marry, that one ſhall have Fee; they enter Marry, neither of them ſhall have Fee, for the Uncertainty. 1 *Inſt.* 218. *a.*

Where one ſhall have Judgment to be hanged, after he is ſlain.

In an Appeal of Death the Defendant waged Battel, and was ſlain in the Field, yet Judgment was given that he ſhould be hanged, which the Judges ſaid was altogether neceſſary, for otherwiſe the Lord could not have a Writ of Eſcheat. 1 *Inſt.* 390. *b.*

One Attainted after his Death.

THE Lord *Coke* obſerves that in *Eire* it has been ſeen, that a Man hath been attainted after his Death by Preſentment. 1 *Inſt.* 390. *b.*

Execution before Judgment.

UPON Iſſue joyned, and Tryal thereupon, a Verdict was found for the Plaintiff, and the *Poſtea* was delivered to the Clerk of the Judgments to enter the Judgment; but through the Clerk's neglect Execution was taken out before it was entred: Hereupon the Court was moved to ſuperſede the Execution, becauſe there was no Judgment to warrant it. *Roll* ſaid, it being but a neglect of the Clerk, Judgment might well enough be entred, tho' the Execution were iſſued forth, and becauſe the Trial between the Parties is right. *Stiles* 229.

Where a Grant to a Monk ſhall be good.

AN *Engliſh* Man goes into *France*, and there becomes a Monk, yet is he capable of any Grant in *England*, becauſe ſuch Profeſſion is not triable, and alſo becauſe all

all Profeſſion is taken away by Statute, and by our Religion holden as void, ſo adjudged in *Ley*'s Caſe. *p. tot. cur.* 2 *Roll.* 43.

Nor will ſuch Profeſſion abroad diſable him to bring any Action here, becauſe it wants Trial, ſo that of foreign Profeſſion the Common Law takes no knowledge. 1 *Inſt.* 132. *b.*

The Freehold diſcontinued, and not the Reverſion.

HUSBAND and Wife Leaſe the Lands of the Wife by Deed for Life, reſerving a Rent; the Husband dies: This was a diſcontinuance at Common Law for Life, and yet the Reverſion was not diſcontinued, but remained in the Wife: Otherwiſe if the Husband had made the Leaſe alone. 1 *Inſt.* 333. *a.*

Reverſion Reveſted, yet the Diſcontinuance remains.

FEME Tenant for Life, the Baron makes a Feoffment, and the Leſſor enters for the Forfeiture; here is the Reverſion reveſted, and yet the Diſcontinuance remains at the Common Law, (for the Wife was put to her *cui in vita*, and could not

not enter after her Husband's Death. 1 *Inst.* 335. *a.*

Where the Defendant may pray and have Judgment againſt himſelf.

IN *Aſſumpſit* to pay ſeveral Summs at ſeveral days, if the Action be brought for default of payment at the firſt day, before any other day of payment is incurred, and the Defendant plead *Non Aſſumpſit*, which is found againſt him, but the Plaintiff will not enter Judgment for fear of being barred to have a new Action upon the ſame promiſe, if default be in the other payments, yet may the Defendant enter Judgment according to the Verdict if he will. 2 *Roll.* 97. *Shapeland* and *Curtis.*

Vide Dyer. 194. *n.* 34. and 2 *Roll.* 97. That if a Verdict be found for the Defendant, and he will not pray Judgment, yet Judgment ſhall be given for him at the prayer of the Plaintiffs, becauſe then he may have his Attaint againſt the Jury.

Where

Where the Plaintiff ſhall have Judgment, tho' the Iſſue be found againſt him.

In *Replevin*, the Defendant avowed for a Rent of 20*l.* ſuppoſing that *I. S.* was ſeized in Fee of the place where, *&c.* and in 28*th* of *Eliz.* granted a Rent of 20*l. per annum*, and for the Rent arrear *an.* 12 *Jac.* he avows, *&c.* it was found ſpecially upon iſſue, *Non conceſſit*, that *T. S.* was ſeized in Fee, and let that Land *an.* 23 *Eliz.* to *I. S.* for 21 Years, and he ſo poſſeſſed granted that Rent, and *ſi*, &c. upon this Verdict, tho' the Iſſue be found *Quod conceſſit*; and ſo for the Avowant, yet becauſe it appears that the Eſtate out of which the Rent is granted, was determined a long time before the diſtreſs taken, ſo that the Defendant had not any title to avow; 'twas held, That Judgment ſhould be for the Plaintiff, tho' the Iſſue was found againſt him. 2 *Cro.* 442. *Harriſon* and *Metcalf*. See 2 *Cro.* 221. 435. 640. *Cro. Eliz.* 157.

Agent and Patient.

IT is a Rule in Law that *Idem non. potest esse Agens & Patiens*, and therefore a Man cannot present himself to a Benefice, make himself an Officer, nor Sue himself; and therefore when one having right to Land, has the Freehold cast upon him by a latter Title, he shall be said in of his ancient Title, because there is none against whom he may Sue but himself, and he cannot Sue himself. *Littleton* 147. *b.*

So no Man can summon himself, and therefore if a Sheriff suffer a common recovery, it is Error, because he cannot summon himself. *Dyer.* 188. *a. Owen* 51.

A Man cannot be both Judge and Party in a Suit, and therefore if a Judge of the *Common Pleas* be made Judge of the *King's Bench*, tho' it be but *hâc vice*, it determines his Patent for the *Common Pleas*; for if he should be Judge of both Benches together, he should controul his own Judgment; for if the *Common Pleas* err, it shall be reformed in the *King's Bench*. (See *Cro. Car.* 600. *Littleton* Chief Justice of the *Common Pleas*, made Lord Keeper, yet continued Chief Justice; so Sir *Orlando Bridgman* was both Lord Keeper

er, and Lord Chief Justice of the *Common Pleas* at the same time, for these places are not inconstent. 1 *Siderf.* 338, 365.

A Bishop cannot hold a Parsonage by *Commendam* within his own Dioceſs, because he cannot visit himself, or be Parson and Ordinary too. 1 *Siderf.* 305.

If a Fine be levied to a Judge of the *Common Pleas*, he himself cannot take the Conusance, for he cannot be his own Judge. But if an Action be sued in C. B. against all the Judges there, there for necessity they shall be their own Judges. 2 *Roll.* 92, 93.

But Note, in many cases the same Person may be Agent and Patient, where the Law cannot do otherwise; as a Feme Tenant in socage may endow herself *de la pluis beale. Lit. Sect.* 48. So an Executor may pay himself by Retainer. So where one may vouch himself. 1 *Inst.* 390. *a.* So where one limits a Remainder to himself.

If one of the Chapter being sole seized enfeoffe the Dean and Chapter, by that he himself shall take by his own Livery. *Perk. Fol.* 42. See *Hob.* 138, 139. A Mittimus directed to the Bishop of *Durham*, commanding him to send a Record to the Justices of the County *Palatine* to be tried there, is well enough, and may be

executed by the Biſhop, tho' he himſelf be one of the Juſtices. So one may be Judge and Officer *diverſis reſpectibus*, as in a Rediſſeiſin, the Sheriff is Judge and Officer. *Cro. Car.* 138. So where a Mayor keeps the Goal. *Cro. Eliz.* 76.

3. *Where one Impannelled on a Jury may challenge himſelf.*

A PEER of the Realm, or Lord of Parliament, *Scil.* Baron, Viſcount, Earl, Marquiſs, and Duke, *propter honoris reſpectum*, are not to be ſworn on Juries, and if neither Party will challenge him, he may challenge himſelf, for 'tis provided by *Magna Charta*, *Quod nec ſuper eum ibimus, nec ſuper eum mittimus niſi per legale judicium parium ſuorum, aut per legem terræ. Co.* 6. 52, 53. But note, If a Peer is to be tried by his Peers, he cannot challenge any of 'em. 1 *Inſt.* 156. *b.*

4. *Where an Infant ſhall not reverſe his Fine.*

IF an Infant being a Feme covert, or other Infant, levy a Fine by grant, and render to her or him in tail, or for Life, and the Husband die, the Wife ſhall not have a Writ of Error, becauſe ſhe is Tenant of the Land, and ſhe cannot have a Writ

Writ of error againſt herſelf, ſo that ſhe is without remedy: So in the caſe of the other Infant, *per Catlyn. Owen* 33.

Where one ſhall have a Formedon *of Land that was never given.*

'Tis holden in 42 *Edw.* III. 53. cited in *Mary Pottington's* Caſe. *Co.* 10. 37. *b.* that in ſome caſe a Man ſhall have a Writ of *Formedon* of Land that was never given, as if Lands in tail are loſt, and the Tenant in tail recovers other Land in value, the Iſſue in tail ſhall have a *Formedon* of the Lands recovered in value, and yet thoſe Lands were not given.

Livery and Seiſin over a Wall.

If one that is ſeiſed in Fee of an Orchard makes a Feoffment of it to *I. S.* and goes into the Orchard, and cuts a Turf, or a Twigg, and delivers it in the name of *Seiſin*, to the Feoffee over a Wall of the ſame Orchard, the Feoffee then being in other Land (not mentioned in the Feoffment) this is a void Livery. 2 *Roll.* 6. *numb.* 5.

Note, If it appears that the Feoffor intends to make an actual Livery, it ſhall never amount to a Livery in Law. 2 *Roll.* 7. *n.* 40.

Where a Man ſhall give and take by his own Livery.

If there be Dean and Chapter, and one of the Chapter is ſole ſeiſed of Land in Fee in his own right, and thereof enfeoffs the Dean and Chapter by Deed, and makes Livery and Seiſin according to the Deed; here the Feoffor gives and takes by the ſame Livery. *Perk. Sect.* 205. So of a Mayor and Commonalty, *&c.*

William the Conqueror's *Charter to* Norman Hunter.

I William *the Third Year of my Reign*
Give to thee Norman Hunter,
To Me that art both Leef and Dear,
The Hop, *and the* Hopton,
And all the Bounds up and down,
Under the Earth to Hell,
Above the Earth to Heaven,
From Me and Mine,
To Thee and Thine,
As good and as fair,
As ever they were;

To witneſs that this is Sooth
I bite the White Wax with my Touth;
Before Jug, Maud, *and* Margerie,
And my youngeſt Son Henry,
For a Bow, *and a broad* Arrow,
When I come to hunt upon Yarrow.

Vide Speed 424. *b.* 2 *Roll.* 181. *Meriton's Anglorum Geſta in Vita. W. I.*

Whether one can take, and looſe a Fee by the ſame Livery.

TENANT in Tail makes a Leaſe for his own Life, the Remainder to the Donor in Fee; this gift of the Fee is void, becauſe the Donor had it before: But if Tenant in Taile make a Leaſe *pur auter vie*, the Remainder to the Donor, this veſts a new Fee in him, becauſe that by the diſcontinuance he deveſted the ancient Fee out of him, and gave him a new Fee-Simple, by *Marvine*: But *Knightly* denied this to be Law, and that there ſhould not be a new Fee-Simple in the Donor, becauſe then he ſhould take a Fee and looſe a Fee by the ſame Livery at an inſtant, which cannot be, *ideo quære Dyer.* 8. *a.* 9. *a.*

Slander.

A. THE Attorney of *B.* brought an Action againſt *C.* for ſaying to *B. Your Attorney is a bribing Knave, and hath taken Twenty Pound of you to cozen me*: Judge *Warburton* held the Words not Actionable, for an Attorney cannot take a Bribe of his own Client: But *Hobart* ſaid he might when the reward exceeds meaſure, and the end againſt Juſtice, as to raze a Record, *&c.* and *Hob.* ſays, after he had ſpoken, Juſtice *Warburton* began to ſtagger in his opinion, and ſo the Plaintiff had Judgment. *Hob.* 8, 9. and 1 *Roll.* 53.

Infant.

AN Infant brought an Action of Treſpaſs by her Guardian; the Defendant pleads that the Plaintiff was above Sixteen Years old, and agreed for 6 *d.* in Hand paid, that the Defendant have licence to take two Ounces of her Hair, to which the Plaintiff demurred, and adjudged for her; for an Infant cannot licence, tho' ſhe may agree with the Barber to be trimmed. 3 *Keb.* 369. *Scroggam* againſt *Stewardſon.*

Treſ-

Treſpaſs for ſhaking a Sword at him.

A WOMAN ſhook a *Sword* in a Cutler's Shop againſt the Plaintiff, being on the other ſide of the Street, and in Treſpaſs of Aſſault and Battery, there was a Verdict of the Aſſault, and not guilty of the Battery: 'Twas prayed to give no more Coſts than Damages, and ſo granted, which was a Noble. 3 *Keb.* 283. *Smith* and *Newſam.*

Where a Man ſhall be forced to ſpend his Money againſt himſelf.

I. S. PRAYED a Prohibition to the Eccleſiaſtical Court at *Salisbury*, becauſe his Wife Sued him there to be ſeparated *propter ſævitiam*, and Sentence was given for him, and he enforced to pay all the Coſts for his Wife; afterwards ſhe appealed, and becauſe he would not anſwer the Appeal againſt himſelf, and pay for the tranſmitting of the Record, he was excommunicated, and now prayed a Prohibition; it was thought by the Court a very hard caſe that he ſhould be obliged to ſpend his Money againſt himſelf; but becauſe it was alledged that the Courſe was ſo in the Spiritual Court, they would adviſe,

adviſe, *&c.* and proceedings ſtayed in the mean time. *Cro. Car.* 16. *Green's* Caſe.

One Indicted for taking away a young Woman, and Marrying her.

ONE *Brown* was Indicted on Stat. 3 *H.* VII. *cap.* 2. for forcibly taking away and marrying the Daughter of one *Sommers*, a City Orphan in the Cuſtody of the Chamberlain: Note, The Child herſelf being about Fourteen Years old was held a good Witneſs to prove the Fact; and the evidence was, that ſhe was worth 5000 *l.* that ſhe was menaced by the Defendant in a Vizard, and carried away in a Coach to *Weſtminſter*, and the next day, with her own conſent, but cauſed by the precedent menace, ſhe married him, but was not defiled, having been ſurpriſed that day; he was found guilty, and had judgment to die, and was accordingly executed. 3 *Keb.* 193. See the Lady *Fullwood's* Caſe. *Cro. Car.* 482, 484, 488, 492. and *Hales*, *Pla. Cor. tit.* Felonies by Stat. that the taking a Woman againſt her Will, and marrying her, is Felony by the ſaid Statute: But ſuch Maid, Widow, or Wife muſt have Lands, Tenements, or Goods, or be Heir Apparent; ſo that the Motive of

of taking away is *Lucre*, and the end *Luxury*, *viz.* Marriage or Defilement.

Action againſt a Cook.

TRIN. 8. *H.* IV. *Rot.* 57. Willielmus Milburn *recuperat per Juratam per Billam ſuam in qua queritur verſus* Johannem Cutting, Cook, *de eo quod ipſe* Johannes *apud* Weſtmonaſterium *vendebat dicto* Willielmo *unum Caponem piſtum corruptibilem & recale factum, qui Capo aſſatus per quatuor dies in Hoſpicium Domini Regis, & iterum calefactus & piſtus extitit, de quo poſtquam edit, vomitum horribilem fecit, ita quod infirmabatur per duas ſeptimanas, recuperat inquam Viginti Solidos pro damnis*: And *Roll* ſays he was informed, that it appears upon the Record at large, that the Judges increaſed the damages. 1 *Roll.* 89.

Burglary.

A. LEASES to *B.* a Shop, parcel of his dwelling Houſe, to work in, where *B.* works in the day, but never lodges in it; this Shop is broke open in the night, and ſeveral Goods ſtollen out, yet not Burglary by the opinion of *Tanfield*, Chief Baron, and Juſtice *Hutton*, becauſe by the ſeverence thereof by Leaſe to him who had

had it as a Shop, and his not inhabiting therein, it was not any Manſion-Houſe, and ſo no Burglary, but ordinary Felony. *Hutton* 33. *Fine.* and *Hales Pla. Cor.* 83.

A Chamber in an Inns of Court, where a Perſon uſually lodges, is a Manſion-Houſe, within the Law; ſo is the Church; ſo is a Shop, (not ſevered by Leaſe) *Dalton's Juſtice, cap.* 151. *Hales ubi ſup.*

A Thief goes down a Chimney to rob, it is Burglary, tho' here was no actual breaking: (for one is not bound to ſtop up his Chimney) *ibid.*

A Gueſt comes to a common Inn, and the Hoſt appoints him his Chamber; and in the night the Hoſt breaks into his Gueſt's Chamber to rob him; this is Burglary. *Nota, Dalton cap.* 151.

Challenges and Duels.

It is againſt the Law of Nature and of Nations (as well as againſt the Law of God) for a Man to be Judge in his own proper Cauſe, eſpecially *in Duello*, where Fury, Wrath, Malice, and Revenge are the rulers of the Judgment: And there is nothing honourable (whatever ſome pretend) that is againſt the Laws of one's Country, and the Law of Nature and Nations. 3 *Inſt.* 157.

The

The Killer is in a worſe Condition than the Killed.

He that ſlayeth is in worſe caſe than he that is ſlain, for the Murderer loſeth not only his Lands and Goods, but his Life alſo, and his Honour, which he ſo much reſpected; for by his Attainder his Blood ſhall be corrupted, and if he were Noble, or Genteel before, he thereby becomes Ignoble and Baſe, and he that is ſlain by Law loſeth none of them; ſo as hereof it is truly ſaid, *Infœlix pugna, ubi majus periculum incumbit Victori, quam Victo. ibid.*

Bare Challenge puniſhable.

If any Subject by Word, Writing, or Meſſage challenge another to Fight with him, this is an Offence before any Combat be performed, and puniſhable by Law, and it is *contra pacem, coronam, & dignitatem*, for *Quando aliquid probibetur, probibetur & omne per quod devenitur ad illud. ibid.*

Much more if they Fight, (tho' no Death enſue, nor Blood drawn,) which being an Affray, and a great breach of the King's Peace, is to be puniſhed by Fine and Impriſonment, and to find Sureties for their Good Behaviour. *ibid.*

What

What Duel allowed by Law.

THERE is a *Duellum* allowed by Law depending a Suit for the Trial of Truth, (see 2 *Inst. W.* 1. *c.* 40.) which kind of Battail in case of Appeals, and Writ of Right is by publick authority and course of Law, whereunto all the people by an implied consent, are Parties; and (as some hold) has it's Warrant by the Word of God, by the single Battel between *David* and *Goliah*, which was strucken by publick Authority. *ibid.*

Where Kings of England *have offered to try their Title by single Combat.*

KING *Edward* III. in the 16*th.* Year of his Reign, having War with the *French* King for his right to the Kingdom of *France*, out of the greatness of his Mind, for the love of his Subjects, the saving of Christian Blood, and a speedy Trial of the right, offered the single Combat with the *French* King, but He refused it.

So after long and chargeable Wars between the Crowns of *England* and *France*, for the right of the Kingdom of *France*, it was an honourable offer which King *R.* II. made to *Charles* the *French* King for

for ſaving of guiltleſs Blood, and to put an end to that bloody and lingring War; 1. Either a ſingle Combat between the two Kings. 2. Or a Combat between the two Kings, and three of their Unkles on either ſide. 3. Or that a fit day and place might be aſſigned when under the univerſal conflict of both their Armies, an end might be put to the War. The Duke of *Lancaſter*, according to his Commiſſion, made theſe offers from the King of *England* to King *Charles* of *France*, but he was *auditus, ſed non exauditus*; for King *Charles* liked none of theſe offers.

And *in Anno Domini* 1196. *Philip*, King of *France* ſent this Challenge to our *Richard* the Firſt, That King *Richard* would chooſe him five for his part, and He, the King of *France*, would appoint five for his part, which might fight in Liſts for trial of all matters in controverſie between them, for the avoiding of ſhedding of more guiltleſs Blood. King *Richard* accepted the Offer, with condition that either King might be of the number; but this condition would not be granted. See 3 *Inſt.* 159

Juſts

Juſts and Tournaments.

If at a Juſt or Turnament, or at the Play with Sword and Buckler by the *King's Command*, one Man kills another, this is no Felony. It was enacted in the Reign of King *H.* II. that if in ſuch caſe one was ſlain, it ſhould be no Felony, for that in friendly manner they contended to try their ſtrength, and to be able to do the King ſervice in that kind upon occaſion. 3 *Inſt.* 56. Otherwiſe of fighting at Barriers, or running at Tilt or Juſts, without the *Kings Command*, whereby a Man is ſlain; and altho it were by the King's Command, yet it was holden Felony by the Juſtices, *tempore*, *H.* VIII. for it was againſt Law. *Bro. Coron.* 228, 229. *Dalton*, *pag.* 352. But it is holden otherwiſe now, *Hob. Rep.* 134. in *Weaver* and *Ward*'s Caſe.

Battel, Champion.

An Approver that kills the party accuſed in Battel, or a Champion that kills the other Champion in a Writ of Right, or the Plaintiff or Defendant in an Appeal that kills the other *in Duello*; in theſe caſes the party killing ſhall forfeit

feit nothing, for theſe Combats or Duels are ſuch trials as the Law appoints in ſuch caſes. 3 *Inſt.* 221.

Whoever takes upon him to be a Champion for another, and becomes recreant, *i. e.* a crying *Coward*, or *Craven*, he ſhall loſe *liberam legem* for his perjury, *that is*, become infamous, and of no credit, never to be a Witneſs or Juror. *ibid.* You may read the form hereof, and the Oath he takes, 2 *Inſt. W.* 1. *cap* 40. and *Glanvil*, *lib.* 2. *cap.* 3.

So if the Appellant join Battel, and cry *Craven*, he ſhall alſo loſe *liberam legem*; but if the Appellee cry *Craven*, he ſhall be hanged: But if they Combat until Night come, and Stars appear, the Defendant in the Appeal goeth quit, and the Plaintiff in that caſe loſes not *liberam legem.* 3 *Inſt. ubi ſupra:*

In a Writ of Right, if the Tenant wage Battel by his Champion, and the Champion after become blind by infirmity, and not *ex ſtultitiâ*, he ſhall be diſcharged of the Battle. 3 *Inſt.* 150. So of an Appellee. If the Appellant after Battel waged become blind upon any occaſion, the Appellee *in favorem vitæ* ſhall go quit. So where the Trial becomes otherwiſe impoſſible by the act of God, or default of the Appellant. 3 *Inſt.* 159.

Provocation to a Challenge.

IN the Lord *Hobart*'s Book, *Fol.* 120. is this Caſe.

The Lord *Darcy*, and *Gervaſe Markham* were hunting together, and *Markham* and one *Beckwith* (a Servant of my Lord's) fell together by the Ears in the Field, and *Beckwith* threw *Markham* down, and was upon him, cuffing of him; the Lord *Darcy* took his Servant off, and reproved him, and yet *Markham* chid my Lord, charging him with maintaining his Man; the Lord *Darcy* replied, That he had uſed him kindly, for if he had not reſcued him from his Man, he had beaten him to Rags; Whereupon *Markham* (after this) wrote five or ſix Letters to my Lord, Subſcribing his Name to 'em, but ſent 'em not, but diſperſed them unſealed in the Fields, to this effect, That whereas the Lord *Darcy* had ſaid, that but for him his Man *Beckwith* had beat him to Rags, he lyed, and as often as he ſhould ſpeak it he lyed, and that he would maintain with his Life; adding, That he had diſperſed thoſe Letters that he might find them, or that ſomebody elſe might bring them to him; and concluded, That if he were deſirous to ſpeak with him, he might ſend his

his Boy who ſhould be well uſed. My Lord *Darcy* ſued *Markham* for this in the Star-Chamber, who was fined 500 *l.* for the Letter thus diſperſed was in the nature of a Libel, ſlanderous and defamatory to my Lord, and tho' without any direct challenge to fight, yet there were plain provocations to it, and as it were to call and challenge my Lord to challenge him: And *Hobart* in his Sentence ſaid, That the Law did not allow any Man to ſtrike in private revenge of ill Words, becauſe there is no proportion between *Words* and *Blows*; but he that is ſtricken may ſtrike again. 'Tis true, there is a Judicial Combat allowed before the Conſtable if a Man be called *Traytor*, where for matter of ſatisfaction in point of Honour, (as it is called) it was left to the Lord Marſhal as a diſtinct Court and Conſideration from the Star-Chamber.

The Lord *Hob.* ſaid alſo in this Caſe, That ſuch Inſolent Perſons (*Challengers* and *Duelliſts*) take upon them to frame a Law and Commonwealth to themſelves, as if they had power to caſt off the Yoke of Obedience to Peace and Juſtice, enacting among themſelves as an undoubted poſition, That a Man wronged may with his Sword in his Hand, require ſa-

tisfaction of any Man, being no Privy Counſellor, and with a mild Word to qualify the deteſtation of this kind of Murder, they have made it a familiar Phraſe, *That he was killed fairly, and he was killed in equal fight*, which Arrogancy and Rebellion muſt be ſubdued. And Judges and Jurors muſt not give way to this impious diſtinction of fair and foul Killing, but muſt execute the Law with ſeverity upon all Murtherers; for the Law knows no ſuch diſtinction: This he vowed publickly to do, taking it to be the only Remedy againſt this damnable Preſumption. The King approved this Sentence, being pleaſed to ſay, The Lord *Hobart* did hit his own mind in it. (King *James*, we know, was a moſt Peaceable Prince.)

Mr. *Selden* ſays, a Duel may ſtill be granted in ſome Caſes by the Law of *England*, and only there. That the Church allowed it anciently appears by this, In their publick *Liturgies* there were Prayers appointed for the Duelliſts to ſay, the Judge uſed to bid them go to ſuch a Church and Pray, *&c.* But whether is this lawful? If you grant any War lawful, he makes no doubt to evince it: War is lawful, becauſe God is the only Judge between two, that is Supream: Now if a diffe-

difference happen between two Subjects, and it cannot be decided by human Teſtimony, (as I will give an inſtance preſently) why may they not put it to God to judge between them by the permiſſion of the Prince? nay, what if one ſhould bring it down for Argument ſake to the Sword-Men; one gives me the Lye, 'tis a great diſgrace to take it, the Law has made no Proviſion to give remedy for the Injury, (If you can ſuppoſe any thing an Injury for which the Law gives no remedy) why am not I in this caſe Supream, and may therefore right my ſelf?

But now for the Inſtance I promiſed, it is in *Fuller*'s *Holy War*, *Page* 44. Thus,

Whilſt *Godfrey*, Duke of *Bovillon*, (afterwards King of *Jeruſalem*) lived in the Court of *Henry* IV. the Emperor, there happened an intricate Suit betwixt him and another Prince about Title of Land, and becauſe Judges could not untie the Knot, it was concluded the two Princes ſhould cut it aſſunder with their Swords in a Combat: *Godfrey* was very unwilling to fight, not that he was the worſe Soldier, but the better Chriſtian: He made the Demurr not in his Courage, but in his Conſcience, as conceiving any private Title for Land not ground enough for a Duel; yea, we may obſerve gene-

rally, that they who long moſt to fight Duels, are the firſt that Surfeit on them; Notwithſtanding he yielded to the Tyranny of Cuſtom, and after the faſhion of the Country, (ſo it was uſed elſewhere beſides in *England*) entred the Liſts, when at the firſt encounter his Sword brake; but he ſtruck his Adverſary down with the Hilt, yet ſo that he ſaved his Life, and gained his own Inheritance.

See the 3 *Inſt. fol.* 157, 158. what Duels are lawful, and what not. And the 2 *Inſt. fol.* 247.

Note, Tho' there be no Proportion between Words and Blows, ſo as to excuſe a Battery, yet if I am provoked by ill Language, and do thereupon draw my Sword, and in heat of Blood kill the Party; whether the Words ſhall not be accounted as a ſudden Provocation to make it *Manſlaughter?* to which purpoſe, *vide* the following Caſe in *Jones*, 432.

David Williams, a *Welſh*-Man, having a Leek in his Hat on St. *David*'s day, being angry at one *Redman* a Porter in the Street for pointing at a Jack of Lent there hanged with a Leek, and ſaying to the ſaid *David Williams*, *Look on your Country-Man*, did ſuddenly take up a Hammer from a Stall, and violently threw it at *Redman*, but miſſed him, and hit one *Marbury*,

bury, who was sitting in his Shop, so as he died. This was agreed not to be within the Statute of Stabbing, but that he might have his Clergy.

Vide 1 *Siderf.* 277. the Lord *Morley*'s Case, where it was agreed by some of the Judges That *Words* without *Blows* is not any *Provocation*, because it is not *answerable*, but that to make a Provocation to fight, there must be *Blows*.

'Twas likewise agreed by them, That if there be a Provocation in a House, whereupon they fight, before that their Reason had gained a *Predominance* over their Passion, and one is killed, this is but Manslaughter: But that if after the Provocation given, they say, that this is not a convenient Place, (and so have reason to Judge of the Conveniency) and appoint another Place, tho' they fight presently after, if one be killed, this is Murther, for the Circumstance shews their Temper.

A. and *B.* fall out, *A.* saith he will not strike, but will give *B.* a Pot of Ale to touch him; *B.* strikes, *A.* kills him. *Murder. Hales Pla. Cor. tit.* Felonies.

A. distorts his Mouth, and laughs at *B.* who thereupon kills him, *Murder. ibid*, and cites 42 *El. Brame*'s Case.

If there be a quarrel between *A.* and *B.* and *A.* Challenges *B.* who declines it, but at length upon importunity, and to vindicate his reputation, meets and fights, and kills *A. Murder.* 14 *Jac. Taverner's* Case.

A. and *B.* are in Malice, *A.* challenges the Field, *B.* refuses to meet, but says he shal' go to morrow to such a Town; *A.* meets him, and assaults him, *B.* kills him, *Manslaughter* and no *Murder. Hales ubi sup.*

Two strive for the Wall, and one kills the other, *Manslaughter.* Two play at Foils, and one kills the other, *Manslaughter.* Sir *John Chichester's* Case, *ibid.*

Testator nods one a Legacy.

No Words, or Language, or Signs almost, but may serve for a Bequest, provided that they be but sensible and intelligible, in regard of that vast extent and latitude of Words, which the Law allows Testators in making Wills, and bequeathing Legacies: Insomuch, that tho' the Testator should quite hold his Peace, and but nod thee a Legacy, whether he can speak, or not, or whether asked thereunto, or not, the Legacy is good. Understand not this of the Testator nodding between sleep and wake, between sence and no sence,

ſence, but when by his nod he makes an intelligible ſign of his mind and intention; the reaſon hereof is, becauſe the Law more favours a Teſtator's Will than his Words. *Orphan's* Legacy, 444. 4.

Legacy to a Child unborn.

IF a Legacy be given to a Child in the Womb, and the birth prove monſtrous, *i. e.* very contrary to the common form and ſhape of Mankind, as with a Crow's Beak inſtead of a Noſe, or with the Face of an Aſs inſtead of a better; in ſuch an ill favoured caſe the Legacy is void: Otherwiſe if 'tis born only with ſome of the leſs principal Members imperfect or ſupernumerary, as with half a Thumb, or two Thumbs, or ſix Fingers on a Hand, or the like: But if the Birth (not accidentally) be imperfect as to its integrals, or defective as to its more noble and principal Parts and Members, as but with one Eye, or one Hand, although the Creature hath Life, the Legacy hath none, for albeit an amplification of the natural form ſhall not prejudice, yet a mutilation thereof will. Note, this extends not to *Hermaphrodites*, who are not excluded a ſingle capacity, for that Sex which moſt prevails with them in nature, ſhall likewiſe pre-

prevail in Law as to the Legacy bequeathed. *Orphan's* Legacy, 475.

Deviſe.

If a Teſtator deviſes a Houſe to *A.* and after gives it by deed to *B.* and then buys it of *B.* again, and dies, and *A.* demands the Houſe, he cannot recover it, unleſs he proves that the Teſtator by a new declaration of his Will, intended he ſhould have it. So if a deviſed Houſe be pulled down, and another built by the Deviſor in the ſame place, the deviſe is void, unleſs it can be proved that the Deviſor intended otherwiſe. *Orphan's* Legacy, 449. 15.

A Miniſter ſworn of the Jury.

One *Beecher*, a Gentleman of the Middle-Temple, was returned in an Attaint, and before the Return of the Pannel, he became a Miniſter of the Church, and at the day of the Return he appeared, and prayed to be diſcharged according to the Privilege of thoſe of the Miniſtry. But the Court allowed not of his Prayer, becauſe he was a Lay-Man at the time of the Pannel made, and ſo he was ſworn. 4 *Leon.* 190. *Beecher's* Caſe.

Forgery

Forgery of a Deed.

ONE *Howel Gwin* was convicted of Forging a Deed by putting a Dead Man's Hand unto it, and condemned in 100*l.* Fine, and to ſtand on the Pillory two hours before the Hall Door: *Memorandum*, he cut off a dead Man's Hand, and put a Pen, and a Seal into it, and ſo Signed, Sealed, and Delivered the Deed with the dead Hand, and ſwore, that he ſaw the Deed Sealed and Delivered. *Stiles Rep.* 362, 363.

Non Obſtante.

THE Clauſe of *Non Obſtante* was firſt uſed by the King in his Grants, and other Writings in the time of *Henry* III. about the Year 1252. *Matthew Paris* calls it an odious and deteſtable Clauſe; and *Roger de Thrusby*, then Juſticiar, fetching a deep Sigh at the ſight hereof in the King's Grant, cryed out of both the time and it, ſaying, *It was a Stream derived from the Sulphureous Fountain of the Clergy.* *Speed* 530.

Præſen-

Præsentia Corporis tollit errorem Nominis.

If I give a Horse to *I. D.* being present, and say unto him, *I. S. take this Horse*; 'tis a good gift, notwithstanding I call him by a wrong Name: Otherwise if I deliver it to a Stranger to the use of *I. S.* where I meant *I. D.*

So if I say to *I. S.* here I give you my Ring with the Ruby, and deliver it with my Hand, and the Ring bear a Diamond and no Ruby; this is a good gift, notwithstanding I name it amiss.

Veritas nominis tollit errorem Demonstrationis.

If I grant *Prata mea in Sale, continentia* 10. *Acras*, and they contain 20 Acres; the whole 20 pass.

If an obligation be made to *I. S. filio & hæredi G. S.* where indeed he is a Bastard, yet this Bond is good.

So if I grant Land *Episcopo nunc* Londinensi *qui me erudivit in pueritia*; 'tis good, tho' he never instructed me.

The same Rule holds of Denomination of Times, and therefore if I oblige my self to do some personal Attendance upon *A.* on *Innocent*'s day, being the day of his Birth,

Birth, and *A.* were not born that day, yet ſhall I attend. *Bacon's Elem.* 87. 91.

What Acts may be done in the Night.

An Arbitriment made and delivered in Writing the laſt day after Sun Set, is good enough, for Judgments and Arbitriments require long Advice. *Finch's* Law, 72. and *Cro. Eliz.* 42. and 676. An Arbitration is a judicial Act, which may be well done in the Night.

Goods may be diſtrained in the Night for damage feaſant, otherwiſe they may be gone before he can take them: But you cannot deſtrain in the Night time for Rent behind. 1 *Inſt.* 142. *a.*

A Rent is payable at a day, he has all the day 'till Night to pay it; but if it is a great Summ, he muſt be ready to tell it before Sun ſet, for the other is not bound to tell it in the Night. *ibid.*

Livery and Seiſin in the Night by an Attorney, good. *Cro. Eliz.* 42. ſaid there to be ſo adjudged. Yet an Atturnment (which is in lieu of Livery, 1 *Inſt.* 49. *a.*) cannot be made after Sun-ſet. *Stiles Pract. Reg.* 47. yet ſure 'tis leſs ſolemn than Livery, which muſt be upon the Land; or in view of it, whereas an Atturnment is but an Aſſent which may be given any where. *ergo Quære.*

Licenſe

Licenſe to ſow Land, no Leaſe.

In Sir *William Eſſex* his Caſe, *Hob. Rep.* 35. The Lord *Hobart* ſays, he is clearly of *Paſton*'s opinion in 21 *H.* VI. 37. That if one licenſe me to ſow his Land, that is no Leaſe of the Land, and therefore if I ſow the Land, the Owner ſhall reap it.

Gift.

A Borrowed 100 *l.* of *F.* and at the day brought it in a Bag, and caſt it upon the Table before *F.* and *F.* ſaid to *A.* (being his Nephew) I will not have it, take it you, and carry it home again with you: *Per Curiam*, it is a good gift by paroll, being caſt upon the Table, for then it was in the poſſeſſion of *F.* and *A.* might well wage his Law: Otherwiſe if *A.* had only offered it to *F.* which had been only a choſe in Action, not to be given without a Writing. *Noy*, 67. *Flower*'s Caſe.

Where one that is no Party to a Record, ſhall have Error to reverſe it.

A Feme covert was Sued as a Feme Sole, but by her Husband's Name; ſhe appear-

appeared and pleaded, and Judgment was given againſt her: The Baron and Feme joyn in a Writ of Error. The Court ſaid, a Stranger to the Record may not have a Writ of Error to reverſe it, but that is, becauſe he may have another remedy to avoid the prejudice: But in this caſe the Baron hath no other remedy, for his Wife is taken in Execution, and by this means he ſhall loſe her Society, and ſo it was reverſed. *Stiles Rep.* 254. 280. *Hayward* and *Williams.*

Where an Attaint may be brought by one that is no Party to the Iſſue.

If two commit a joint Treſpaſs, there can be but one Satisfaction, and therefore if they be ſued in one Action, tho' they may ſever in Pleas and Iſſues, yet one Jury ſhall aſſeſs damages for all; and note, as to the damages, he that is no Party to the Iſſue, ſhall have an Attaint as well as his Fellows. *Hob.* 66. *Cock* and *Jennor.* 2 *Cro.* 349. *accord* that if the damages be too great, any of the Defendants may have an Attaint, tho' he be not the ſame Party againſt whom the Verdict was found: The reaſon hereof is given in Sir *J. Heydon's* Caſe. *Co.* 11. 5. *b.* that although he be a Stranger to the Iſſue,

ſue, yet becauſe that by the Law he is privy in charge, he ſhall have an Attaint.

Veſſels go with the Wines as Acceſſories, in a Bequeſt.

A BEQUEST of Wines doth convey the Veſſels wherein they are, to the Legatary; not as if a Man in his Liquor ſhould think (for no Man elſe would) the Veſſels were part of the Wines (as Medals of Gold or Silver are part of ſuch Metals) but becauſe the Teſtator's intention in the Eye of the Law, ſeems to bequeath them as Acceſſories to the Principal; excepting ſuch which by reaſon of the greatneſs of their Bulk, and wide Capacity cannot without much difficulty be removed out of the Cellars where they are. *Orphan's* Legacy, 474. 103.

A Legacy taken away under a Condition, is underſtood as given under the contrary condition, as if a Teſtator ſaith [A. B. *ſhall not have* 100 l. *if my Ship which I expect home ſhould chance to periſh in the Sea.*] in this Caſe *A. B.* ſhall have 100 *l.* if that ſhip ſhall ſafe arrive. *Orphan's* Legacy, 464. 24.

Chri-

Chriſtian Name.

DECLARATION *in Aſſumpſit quod cum quidam* ..... *Aliſon* was indebted to the Plaintiff for Wares ſold; the Defendant in conſideration the Plaintiff would forbear, did promiſe to pay, if the ſaid ..... *Aliſon* did not pay: After Verdict and Judgment for the Plaintiff, error was aſſigned that no Chriſtian Name was alledged. Chief Juſtice *Rainsford*, and *Twiſden* were of opinion, That the Plaintiff muſt averr the certainty of his Prænomen or Chriſtian Name, and that Verdict helps it not, no more in Suit againſt the third Perſon than againſt the Party himſelf to whom the Goods were ſold; and it cannot be intended that *quidam* was the Chriſtian Name, it being with a blank. The other Judges *contra*, becauſe he may be a Jew, or an Anabaptiſt that hath no Chriſtian Name, and the forbearance only is the ground of the Action. Indictment for ſtealing Goods *de quodam ignoto*, good, becauſe the ſtealing is the ſubſtance: And tho' the Defendant might have demurr'd, yet after Verdict it is well enough. 3 *Keb.* 769. *Bechino* and *Gumly*. *Adjornatur.*

Bond not to exerciſe his Trade.

A MAN was bound in an Obligation to another, that he ſhould not uſe his Art in ſuch a Town for two Years: *Hull* ſwore *by God* if the obligee were preſent he ſhould go to Priſon 'till he had paid a Fine to the King, becauſe the Bond is *contra Legem terræ.* 2 *H.* V. *fol.* 5. *b.* See *tit.* Impriſonment. *Fitz.* 14.

Juſtice *Reeve* ſaid (*March Rep.* 193) he was confident you ſhall never find one Report againſt this opinion of *Hull*, ſuch Bond being void, becauſe it takes away a Man's livelihood, which is one reaſon againſt Monopolies, which is grounded upon the Law of God, for in *Deuteronomy*, Chap. 24. Ver. 6. it is ſaid, *No Man ſhall take the nether, or the upper Milſtone to pledge, for he taketh a Man's Life to pledge.* Which may alſo be the reaſon that the Utenſils of a Man's profeſſion cannot be deſtreined, for thereby the means of his Livelihood ſhould be taken away. See *Noy* 180.

It may not be impertinent to ſet before you the following differences under this Head: for ſome Books ſay, that a promiſe not to exerciſe ones Trade in ſuch a Town is good, but that a Bond in ſuch caſe is void,

March

March Rep. 77. *pl.* 121, and 191. *pl.* 238. *Barrow* and *Wood.*

Broad and *Jollyffe's* Caſe, 2 *Cro.* 596. is That one may *Upon Conſideration* agree, and promiſe, that he will not keep Shop in ſuch a Vill or Street, for that *Volenti non fit injuria.* And in the Caſe of *Prugnel* and *Goſs*, *Allen's Rep.* 67. *Roll. Juſt.* takes theſe differences. Where a Bond or Promiſe reſtrains the exerciſe of a Trade, altho' it be as to a particular place only; yet if it be upon no conſideration, the Bond and Promiſe is void: But if there were a Conſideration for the reſtraint, as if *A.* aſſign a Shop, or ſell braided Wares to *B.* there in reſpect of the apparent prejudice which may accrue to *B.* if *A.* ſhould continue the Trade; ſuch a Bond or Promiſe is good, adjudged ſo in *Froward's* Caſe upon a Writ of Error. But note, although there be ſuch a conſideration, yet if the reſtraint be general throughout *England*, it is void. *Vide* 1 *Roll.* 16, 17. and *Moor*, 115. and 242.

Cunning Practice.

A Man was Arreſted in an Action of Debt, and preſently made a Warrant to an Attorney to acknowledge a Judgment for him, upon which he was diſcharged;

but afterwards he revoked the Warrant of Attorney, before the Judgment was confeſſed; the Court obſerviug this cunning practice, commanded the Attorney to plead *Non ſum informatus*, that Judgment might be entred, and ſaid, they would defend him againſt the Party, if he brought an Action againſt him. *Latch* 8.

Trick in the buſineſs.

THE Court was moved, that there might be a Rule of Court for *I. S.* upon ſatisfaction made of a Judgment obtained by him, to acknowledge Satisfaction; but the Court denied it, and ſaid there was ſome Trick in the buſineſs, for no doubt but the Party upon receipt of what is due to him, will acknowledge Satisfaction without a Rule to compell him. *Stiles* 164.

The River of Thames *a High-Way.*

MR. Attorney General prayed Judgment in an Information againſt *Smith* for laying Logs (which is a Nuiſance) on the River *Thames*: The Defendant pleaded the general Pardon, but Nuiſances on the High-Way being excepted therein, and this being as much a High-Way as the Road, and the Hundred anſwerable for

Robbery

Robbery thereon, Judgment was given for the King. 3 *Keeble* 759.

Intention of the Parties.

A. CONTRACTS with *B.* for 18 Barrels of Ale, paying a certain ſumm of Money, and *A.* would have kept the Barrels after the Ale was ſpent, but adjudged he ſhould not, for the intent of the Parties never was that the Vendee ſhould have them, but only the Ale, and the common uſage is that the Vendor ſhall have the Barrels again. 27. *H.* VIII. 27. *b.* cited 1 *Bulls*, 175.

So if one covenant with another, that if he come to his Houſe, he will give him a Cup of Wine, and he comes; he ſhall not have the Cup alſo, becauſe it was never the intent of the Party. *ibid.*

Countermand of Arreſt.

A. DELIVERS a Writ to the Sheriff to arreſt *I S.* and after forbids him, and deſires the Writ again; the Sheriff refuſes, and arreſts *I. S. Quære*, if *I. S.* may have *faux* Impriſonment againſt the Sheriff? It ſeems he may not: Whether ſhall *A.* have an Action upon the Caſe againſt the Sheriff? it ſeems he ſhall, for it may be he is

prejudiced: Whether the Sheriff ſhall have an Action againſt *A.* for his Fee? *Latch Rep.* 19.

Slander by an Infant, and againſt an Infant.

An Action upon the caſe for Words lies againſt an Infant of Seventeen Years of Age, for *Malitia ſupplet ætatem. Noy* 129.

An Infant brought an Action againſt one *Child* for theſe words, *I charge thee with Felony*, and had a Verdict and Judgment, tho' moved in arreſt, *&c.* becauſe not averred the Plaintiff was of an Age to commit Felony; for the Defendant muſt plead that, and ſhall not be averred by the plaintiff to avoid his own Action. *Noy* 124. *Baily* againſt *Child.*

Grant of the next avoidance by Letter.

I. S. Brought a *Quare impedit*, declaring upon a grant of the next Avoidance; the Defendant demanded Oyer of the Deed, and the Plaintiff ſhewed a Letter which was written to his Father by the Patron, wherein he tells the Father that he had given to his Son (the Plaintiff) the next avoidance: Whereupon the Defendant demurred, and adjudged for him, for the Letter was a meer banter, and the

the grant not good without Deed. *Owen* 47. and *Cro. Eliz.* 163, 164.

A. granted the next Avoidance to *B.* and *C.* and was bound to *B.* in an obligation that he ſhould enjoy the ſaid Preſentment without any diſturbance or claim of the ſaid *A. C.* releaſed to *A.* his intereſt in the ſaid Advowſon; the Church became void, *A.* offered to joyn with *B.* in the preſentation: It was holden the obligation was forfeited, notwithſtanding that *A.* had a *puiſne* Title after the Bond entred into. 4 *Leon.* 18. *Bluet's* Caſe.

Legacy of Books.

A TESTATOR ſaith [*I give my Phyſick Books to my Son, if hereafter he ſhall ſtudy Phyſick; but if he make the Law his Profeſſion, then let him have my Law Books.*] the Son after ſtudies Law and Phyſick both; he ſhall have the Teſtator's Books of both Profeſſions. *Orphan's* Legacy, 472, 89.

If the Teſtator ſaith [*I bequeath or commit my Eſtate as well as my Soul to God.*] whoever hath his Soul, his pariſh-Church ſhall have his Eſtate. *Orphan's* Legacy, 471, 81.

Bequeſt of Horſes.

IF a Man bequeath all his Horſes, his Mares ſhall go too, but not *è contra*; nor by a bequeſt of Geldings. *ibid.* 467, 53, 56. and *fol.* 441, 12.

Deviſe.

A. DEVISES that *B.* ſhall be his Heir, and *C.* deviſes Lands to *A.* and his Heirs, *B.* ſhall have thoſe Lands as Heir to *A.* for a Deviſe ſhall not be conſtrued void, when it poſſibly by any probable conſtruction can be made good: So note, a Man may be Heir *ex vi Teſtamenti*, before he is Heir *ex vi Doni.* 2 *Siderf.* 27.

Heir by deſcent of an Eſtate that by poſſibility could not be in his Anceſtor.

LAND is given to *A.* and *B.* ſo long as they jointly together live, the Remainder to the right Heirs of him that dies firſt; *A.* dies, the Remainder veſted not during the Life of *A.* (his Death muſt precede the Remainder) and yet his Heir ſhall have the Land by deſcent. 1 *Inſt.* 378. *b.*

Note,

Note, whenſoever the Anceſtor takes a Freehold, and after a limitation is made to his right Heirs, they ſhall not be Purchaſers, tho' in Words it be limited by way of Remainder: But if a Leaſe for Years be made to *A.* Remainder to *B.* in tail, Remainder to the right Heirs of *A.* there the Remainder veſts not in *A.* but the right Heirs ſhall take by Purchaſe, if *A.* die during the Eſtate tail. 1 *Inſt.* 22. *b.* 376. *b.* 319. *b.* 2 *Roll.* 417.

Where a Priſoner ſhall not be judged in Execution, tho' he yield himſelf unto it.

A PRISONER having been in execution, was ſuffered by the Gaoler to go out, and then came into the Gaol again, and remained there till the time of another Sheriff, and then eſcaped; the new Sheriff is not anſwerable for it, by *Hobart*: For when he was let to go abroad voluntarily by the Gaoler, the Execution was utterly diſcharged, ſo as he could not be taken again legally, nor ſo judged in Execution, tho' he would yield himſelf unto it, or the Creditor ſo allow him: Neither can two Sheriffs be chargable *Simul & Semel* for two eſcapes out of one and the ſame Execution at the ſame time. *Hob.* 202. Sheriff of *Eſſex* his Caſe.

Note,

Note, it was agreed by the Court in the Case of *Allanson* and *Butler*, 1 *Siderf.* 330. that if a Prisoner in Execution escape by negligence, he may be retaken either by the Sheriff, or the Plaintiff; but if he escape by the agreement of the Sheriff, he cannot retake him, but the Plaintiff may, for otherwise by the death or insufficiency of the Sheriff, he should be left without remedy.

Execution Discharged.

A. HAD a judgment and execution against *B.* who was thereupon taken, and in custody in the *King's Bench* Prison; *A.* consented afterwards that *B.* should come to him out of Prison to the *Horse Shoe* Tavern, which was out of the Rules, without a Keeper, or Rule of Court, thinking to make some agreement with him: *B.* accordingly went to the Tavern, but because they could not agree the Matter, *A.* took him up again upon the same Execution in the same Prison, whereupon *B.* brought an *Audita Querela*, and adjudged well, for the Execution was discharged by the Prisoner's going at large with the Plaintiff's consent, and so could not be retaken upon it! *Stiles* 117. *Walker* and *Alder*'s Case, and 147 Accord.

Slander

Slander of a Midwife.

A MIDWIFE brought an Action upon the Caſe for ſaying, *She is an ignorant Woman, and hath ſmall practice, and is very unfortunate in her way, but goeth about feeling Women's Bellies, but there are few but are ſick or die under her Hands.* Judgment was given for the Plaintiff. 2 *Keb.* 489. *Wharton* and *Clover.*

A Sheriff cannot upon private proceſs ruſh into a Houſe, which by Craft he gets to be opened.

AN Under-Sheriff and others upon a private Proceſs at the Suit of *C.* againſt *D.* who lay in the Houſe of *A.* came and knocked at *A*'s. Door, whereupon *A*'s Wife came to the Door, and opened it a little to ſee who was there, upon which they preſently with their Swords drawn, ruſhed in upon her whether ſhe would or no, and bare her down, and brake open the Chamber Door where *D.* lay, and brake alſo *B*'s Houſe adjoining to it, to get Inſtruments to break doors withal, and hurt divers in the Houſe: The Lord Chief Baron, and Lord *Hobart* held the firſt entry unlawful, for the opening of the Door was occaſioned by 'em by craft, and then uſed to the vio-

violence intended. *Hob.* 62. See *Co.* 5. 92. *b.* and 2 *Cro.* 556.

One Man kills another taking him in Bed with his Wife.

ONE *Maddy* taking of *Nabor* in the Act of Adultery with his Wife in his Houſe, killed him upon the ſpot, and the Court conceived it but Manſlaughter, here being a ſufficient provocation, and no precedent Malice; ſo he had his Clergy, and was gently burnt, *&c.* 2 *Keb.* 829.

Outlawry muſt be reverſed in Perſon.

SIR *W. Reade* being outlawed upon an Indictment for not repairing a Bridge, brought a Writ of Error, and moved to purſue it by Attorney, and put in Bail, and not to appear in Perſon: But all the Clerks of the Crown-Office affirmed that none could aſſign Error upon Indictment but in Perſon, and ſo alſo to put in Bail: The Court greatly pitied Sir *William*'s Caſe, becauſe he was Ninety years of Age, and very infirm, having kept his Chamber for a year and more by reaſon of his infirmity; and they conferred with the Attorney General how it might be done; but all at length reſolved it could not be admitted, being

being againſt the courſe of the Court, and doubted if the King's Privy ſeal could help him: Sir *William* was thereupon brought from his Houſe ten miles from *London* in a Horſe-Litter upon Mens ſhoulders to the Bar, and came into the Court, and aſſigned his Error, and put in bail to proſecute, *&c.* The Error was, that he was named in the Indictment and Exigent *Willielmus Reade Miles, de Comit. Midd.* without ſaying *de* ſuch a place, alledging ſome place certain within the County, and therefore reverſed. 2 *Cro.* 616.

Note, ſome time before this Caſe, an Outlawed Perſon prayed to appear by Attorney, and upon Affidavit made of his ſickneſs, the Court *ex gratiâ ſpeciali* allowed him to appear by Attorney, but commanded the Clerk to enter it, *Quod venit in propriâ perſonâ*, the Law being clear that upon an Outlawry he muſt appear in Perſon. 2 *Cro.* 462. *vid. Stiles* 297.

See 4 *Leon.* 22. *Taylor*'s Caſe, this difference agreed, where matter in Fact is pleaded to avoid an outlawry, it ought to be in Perſon; but a matter of Record might be pleaded by Attorney.

Scribere

Scribere cum Daſho.

ONE *Coſwell* outlawed, moved to reverſe it, becauſe inſtead of *proxim.* there is uſed *px.* for it's abbreviation, without any daſh; then inſtead of *Infra ſcr.* the abbreviation of *Infra ſcriptam*, there is uſed *Infra ſr.* for which exceptions 'twas quaſhed. *Stiles* 18.

Nonſence, how to be conſtrued in giving a Legacy.

AN Imperfect Speech in bequeathing a Legacy may be reduced to ſuch as is equivalent to that which is perfect; if the Teſtator's mind and meaning may rationally be preſumed: For example, the Teſtator ſaith, [*Let* 10 l. *to* A. B.] without the Words [*Be given*] *Orphan's* Legacy 464, 12.

A. *deviſes, then takes the Deviſee to Husband*, &c.

ALICE *Allen* made her Will, and thereby deviſed certain Meſſuages to *James Aſmynde* and his Heirs, and afterwards ſhe married the ſaid *James*, and during the Coverture ſhe often ſaid he ſhould never have the Meſſuages by the ſaid Will: She died

died without Iſſue, he ſurviving, and adjudged that her marriage revoked the Will, for it is againſt the nature of a Will to be irrevocable, ſince it takes not any effect 'till the death of the Deviſor, and her own Countermand after marriage was of no force, becauſe then ſhe is wholly ſubject to the Will of her Husband; therefore the taking of him to Husband being her own proper Act, amounts to a Countermand in Law, otherwiſe it were very miſchievous to Women, that their Wills ſhould be in force whether they will or no; and 'tis not fit to leave it in the Wife's choice to Countermand, becauſe the compulſion of the Husband is to be feared. *Co.* 4. 60. *b. Force* and *Hemblin's* Caſe.

King Edgar's *Law againſt Drinking.*

THE *Danes* firſt brought into this Realm *Exceſſive Drinking*, and King *Edgar* permitting many of them to dwell here, was at length conſtrained to make a Law againſt this exceſs, (which never comes alone) driving certain Nails into the ſides of their Cups, as limits and bounds, which no Man upon great Pain ſhould be ſo hardy as to tranſgreſs. 3 *Inſt.* 200.

If the exceſs of Drinking extend to the loathſome and odious vice of Drunkenneſs, it

it is punishable by Act of Parliament: See *4 Jac. cap. 5. 7 Jac. cap. 10. 21 Jac. cap. 7.*

The Ancient *Britains* were free from this Crime. *Ecce Britannorum mos est laudabilis iste, Ut bibat Arbitrio Pocula quisque suo.*

A Drunkard is *voluntarius Dæmon*, and what hurt or ill soever he does, his Drunkenness aggravates it, *Omne Crimen Ebrietas & incendit & detegit. 1 Inst. 247. a.*

Offences Capital and Civil.

IN many cases the Law will not punish Capital offences in so high a degree, except the Malice of the Will appears, and this *in favorem vitæ*; but in Civil trespasses and wrongs of a lower nature, the Law rather regards the damage of the Person injured, than the Malice of the wrong-doer: And therefore the Law makes a difference between killing one upon Malice prepensed, and upon present Heat; but if I give a Man slanderous Language, and thereby damnify him in his Name and Credit, it is not material whether I use them upon sudden Choler and Provocation, or of set Malice, for in an Action upon the Case, I shall render Damages alike.

So if a Man be killed by Misadventure, as by an Arrow at Butts, it is pardoned of course; but if a Man be hurt or maimed only,

only, an Action of Treſpaſs lies, tho' it is done againſt the Parties Will, who ſhall be puniſhed in the Law as deeply as if it had been done malitiouſly. *Hob.* 134. the Caſe of *Weaver* and *Ward*.

So if Baron and Feme commit a Felony together, ſhe is neither principal nor acceſſory, in reſpect of her obedience to her Husband's Will; but if they joyn in committing a Treſpaſs upon Land or, *&c.* the Action may be brought againſt them both.

(See *Dalton* 104. that if Husband and Wife do both a Felony, it is Felony in both, and both arraigned for it: But *Hales* in his *Pla. Coron.* ſays, *Nota*, that Books old and latter, and practice is otherwiſe. *fol.*65.)

If an Infant within years of Diſcretion, or a Mad-man kill another, he ſhall not be impeached for it; but if they put out a Man's Eye, or do him any corporal hurt, he ſhall be puniſhed in Treſpaſs. *Hob.* 134 and *Bac. Elem.* 32.

One born Deaf and Dumb, kills another.

If one that is Dumb killeth a Man, it it is Felony; yet *Quere*, how he ſhall be arraigned. *Dalton cap.* 147. *pag.* 351.

A Man born Deaf and Dumb kills another, that is no Felony, for he can't know whether he did evil or no; neither can

he have a felonious intent: Otherwiſe if not born ſo. *ib.* See *Bro. Coron.* 101. and 217. that a Man which can neither hear nor ſpeak may commit Felony, and ſhall be impriſoned, *&c.*

A Releaſe of a right to one that hath neither Freehold in Deed, or in Law, yet good.

THE Demandant may releaſe to the Vouchee, and yet the Vouchee hath nothing in the Land; but the reaſon is, becauſe when the Vouchee entreth into the Warranty, he becomes Tenant to the Demandant, and may render the Land to him in reſpect of the Privity. 1 *Inſt.* 265. *b.*

If the Tenant alien hanging the Præcipe, the Releaſe of the Demandant to the Tenant to the Præcipe is good, and yet he hath nothing in the Land. *ibid.*

If a Diſſeiſor lets the Land for Life, the Diſſeiſee may releaſe all his right to the Diſſeiſor in reverſion, tho' he has nothing in the Freehold, becauſe he hath an Eſtate in him, *viz.* the Reverſion. *Lit.* Sect. 449.

Curteſie of England.

If a Woman ſeiſed of Lands in Fee takes Husband, and by him is big with Child, and in her Travail dies, and the Child is ripped out of her Body alive, yet ſhall not the Husband be Tenant by the Curteſie, becauſe the Child was not born during the Marriage, nor in the life time of the Wife; but in the mean time the Land deſcended, and in pleading he muſt alledge that he had Iſſue during the Marriage. 1 *Inſt.* 29. *b. Co.* 8. 35. *a. b.* in *Pain's* Caſe.

A Secret of Law.

Littleton ſays, In every Caſe where a Man takes a Wife ſeiſed of ſuch an Eſtate of Tenements, *&c.* as his Iſſue by her may by poſſibility inherit, *As Heir to the Wife*, in ſuch caſe after her Death he ſhall have 'em by the Curteſie of *England*, and otherwiſe not.

In the Words [*As Heir to the Wife*] my Lord *Coke* has diſcovered a Secret of Law, for except the Wife be actually ſeiſed, the Heir ſhall not make himſelf Heir to the Wife, which is the reaſon that a Man ſhall not be Tenant by the Curteſie of a

Seisin in Law. 1 *Inst.* 40. *a. Co.* 8. 34. in *Paine's* Case.

Another reason is, because it lies always in his Power to reduce the Seisin in Law by his entry to an actual Seisin, and so it shall be accounted his own laches; for it is otherwise in case of Rents and Advowsons, where if the Wife die before the Rent became due, or the Church void, yet the Husband shall hold by Curtesie, because he could by no Industry attain to any other Seisin; which is likewise the reason why a Woman shall be endowed of a Seisin in Law of Lands, because it lies not in her power to reduce it to an actual Seisin.

Corporalis injuria non recipit æstimationem de futuro.

The Law in many Cases that concern Lands or Goods deprives a Man of his present remedy, and turns him over to a farther circuit of remedy, rather than to suffer an Inconvenience; but if it be a question of personal Pain, the Law will not compel him to sustain it, and expect remedy, because it holdeth no damage (that may be given) a sufficient recompence for a Corporal wrong.

There-

Therefore if one menace me in my Goods, and that he will burn certain Evidences of my Land, which he has in his Hand, if I will not make unto him a Bond; yet if I enter into Bond by this Terror, I cannot avoid it by Plea, becauſe the Law holds it an Inconvenience to avoid a ſpecialty by ſuch matter of Averment, and therefore I am put to my Action againſt ſuch Menacer; but if he reſtrain my Perſon, or threaten to beat me, or burn my Houſe, which is a ſafety and protection to my Perſon, and upon ſuch menace or dureſs I make a Deed, I ſhall avoid it by Plea.

So if a Treſpaſſer drive my Cattle over the ground of *I. S.* and I purſue to reſcue them, yet am I a Treſpaſſer to *I. S.* but if one aſſault my Perſon, and I fly over anothers Ground, I am no Treſpaſſer.

So if the Sheriff make a falſe return that I am ſummoned, whereby I loſe my Land, yet becauſe of the inconvenience of drawing all things to incertainty and delay, if the Sheriff's return ſhould not be credited, I am excluded of my Averment againſt it, and am put to my Action of Deceit againſt the Sheriff and Summoners. But if the Sheriff upon a *Capias* return a *Cepi Corpus, & quod eſt languidus in priſona*, there I may come in and falſifie the return

to save my Imprisonment. 5 *Edw.* IV. 80. 3 *H.* VI. 3. *Bac. Elem.* 29, 30. 1. *Roll* 92.

Felony, and Chancemedley.

PLAYING at *Hand-Sword*, *Bucklers*, *Foot-Ball*, *Wrestling*, and the like, whereby one of them receives hurt, and dies thereof within a Year and a Day: In these Cases *some* hold, that this is Felony of Death; *others*, that they shall have their Pardon of course, as for Misadventure, for that such their Play was by consent, and because there was no former Malice, but done only for disport, and trial of Manhood. *Dalt.* 352. See *tit. Justs* and *Chancemedley in hoc Libro.*

Justification in case of Necessity.

THE *Ferry-Man* of *Gravesend* took Forty seven Passengers into his Barge to go to *London*, amongst whom was one *Mouse*; the Barge being upon the Water, a great Tempest arose, insomuch that the Barge, and all the Passengers were in danger to be drowned, if a Hogshead of Wine, and other ponderous things were not cast out; among which things there was a Casket with 113 *l.* of *Mouse*'s, which *I. S.* took and threw over-board; whereupon *Mouse* brought

brought Treſpaſs, *&c.* It was reſolved *per Curiam*, that in caſe of neceſſity for ſaving the Paſſengers lives, it was lawful for *I. S.* being a Paſſenger, to caſt the Plaintiff's Casket out of the Barge, with what was in it, [*Quod quis obtutelam corporis ſui fecerit, jure id feciſſe videtur.*] and 'twas directly proved that the Men had been drowned if the things had not been heaved out: But 'twas agreed alſo that the Owners in ſuch Caſe ſhall have their Remedy upon the ſurcharge againſt the Ferry-Man; and if there is no ſurcharge but the danger comes by the Act of God, then every one muſt bear his own Loſs. 12 *Rep.* 63. and 2 *Roll.* 567.

One may juſtifie the felling of a Tree in the Ground of another in Caſe of neceſſity. 6 *E.* 4. 8.

See 22 Aſſiſe 5, 6. that a Man may juſtifie the beating another, if he be in a Rage.

So Eſtrays may be fettered, if they are fierce and unruly. *Hut. Rep.* 67. and *Winch* 67, 124.

If a Man has a way over my Land for his Cattle to paſs, and they in paſſing eat the Graſs againſt his Will, this is juſtifiable. 2 *Roll.* 566, 567. *Reeve* and *Downs.*

Note this for a Rule, That in all Treſpaſſes there muſt be a voluntary Act, and alſo a damage; otherwiſe an Action of Treſpaſs lies not.

In Treſpaſs for Ploughing his Land, the Defendant ſaid, the Plaintiff's Land is adjoyning to his, and that when he was Ploughing his own Land, the Horſes were unruly, and by violence carried the Plough into the Land of the Plaintiff, *contra voluntatem ſuam*, and held a good Juſtification; for if a Man be doing a lawful Act, which afterwards becomes illegal, againſt his Will, that is *damnum ſine injuria*. 22 E. 4. 8.

One cannot juſtifie a Treſpaſs upon another for fear.

IN Treſpaſs for breaking of a Houſe and Cloſe, the Defendant pleaded, that *Duodecem homines ignoti modo querrino armati tantum minabantur ei, quod de vitæ ſuæ amiſſione dubitabat*, and after *requirabant & compulſabant* the Defendant to go with 'em to the Houſe, *quodque ob timorem minarum, & per mandatum & compulſionem dictorum duodecem hominum*, he did enter the ſaid Cloſe and Houſe, and returned immediately through the ſaid Cloſe, which is the ſame Treſpaſs, *&c.* Adj. no Plea upon demurrer, for one cannot juſtifie a Treſpaſs upon another for fear, and the Defendant has remedy againſt thoſe that compelled him; the pleading too was naught, becauſe he did not ſhew that the way to the Houſe

was

was through the Close. *Allen* 35. *Gilbert* and *Stone. vide* the same Case *Stiles* 72. with this further reason, that the Person injured shall have no satisfaction (if such Plea be allowed) for he cannot have it of those that threatened. But see *Stiles* 65. in Trespass *pedibus ambulando*; the Defendant pleads, he was carried upon the Land by force and violence of others, and was not there voluntarily, which is the same Trespass, *&c.* upon Demurrer. *Roll.* Justice said, it is the Trespass of the Party that carried the Defendant upon the Land, and not the Defendant's Trespass; as he that drives my Cattel into anothers Land is the Trespassor, and not I who am the owner of the Cattle.

Presumption of Law.

In many Cases the Law will admit no proof against what it presumes: Therefore, If a Rent be behind for 20. Years, and the Lord make an Acquittance for the last that is due; all the rest are presumed to be paid, against which presumption the Law will admit no proof. *Dyer.* 271. *a.* 11 *H.* IV. 55.

So if a Man be within the Four Seas, and his Wife hath a Child, the Law presumes it is the Child of the Husband, and will admit no proof to the contrary. 7 *H.* IV. 9. 1

9. 1 *Inſt.* 373. *a.* unleſs the Husband be caſtrated. 1 *Roll.* 358.

An innocent perſon is accuſed of Felony, and being afraid, flies for it; tho' he after judicially acquit himſelf thereof, yet if it be found that he fled for the ſame, he ſhall forfeit (notwithſtanding his innocency) all his Goods and Chattels, Debts and Duties; for as to the forfeiture of theſe, the Law will allow no Proof againſt the preſumption in Law, grounded upon his flight. 1 *Inſt.* 373. *a. b.*

So if the Uncle of the Iſſue releaſes with Warranty to the Diſcontinuee of Tenant in tail, and dies without Iſſue; this is a collateral Warranty to the Iſſue in tail, barring him without any Aſſets, or Eſtate deſcended from him that made the Warranty, the Law preſuming that the Uncle would not unnaturally diſinherit his Lawful Heir, being of his own Blood, of that right which himſelf never had, without leaving him greater Advancements. 1 *Inſt.* 373. *a.*

Forfeiture.

Two Joynt-Tenants for Life, the one grants his Eſtate for the Life of his Companion; it was held a Forfeiture, for firſt, it is a ſeverance of the Joynture, and then a Leaſe for another's Life. 4 *Leon.* 236.

Re-

Remainder for the Life of Tenant for Life, good.

If a Remainder be limited to one for term of the Life of Tenant for Life, the Remainder is good, but for this reaſon only, becauſe that by poſſibility the Tenant for Life may alien in Fee, and ſo forfeit his Eſtate, whereby the Remainder ſhall enter for the Forfeiture, and enjoy the Eſtate during the Life of the Tenant for Life, who committed ſuch forfeiture. *Co.* 2. 50, 51.

The King of Spain *Out-lawed in* Weſtminſter-Hall.

The King of *Spain* was Out-lawed in *Weſtminſter-Hall*, I being of Councel againſt him, (ſays *Selden*) the Caſe was this; A Merchant had recovered Coſts againſt him in a Suit, which becauſe he could not get, we adviſed to have him Out-lawed for not appearing, and ſo he was: As ſoon as *Gondimer* heard it, he preſently ſent the Money, by reaſon that if his Maſter had been Out-lawed, he could not have the benefit of the Law, which would have been very prejudicial to him, there being then many Suits depending betwixt the King of *Spain*, and our *Engliſh* Merchants.

Vide

Vide Stiles Pract. Reg. 382. that *Mich.* 22. *Car. B. R.* the King of *Spain* was Non-Suit in *England*; for if a foreign Prince will have benefit of the National Laws here, he muſt proceed and abide by the Rules and Orders of the Court wherein he prefers his Action.

Where one ſhall be a Baſtard tho' born in Marriage.

If the Husband be Caſtrated, ſo as it is apparent that he cannot by any poſſibility get a Child, and his Wife has Iſſue ſeveral years after, it ſhall be a Baſtard, tho' engendred in Marriage, for that it is a plain caſe it cannot be legitimate: But *Hobart contrà.* 1 *Roll.* 358. *Initio.*

If the Wife of an Infant of the Age of Nine Years has a Child, it is a Baſtard. 29. *Aſſ.* 54. *quære.* 1 *Roll.* 359.

If a Man marry a Woman big with Child by another, who is delivered within three days after, the Child is a Baſtard by the Law Spiritual, (but by our Law legitimate.) 18. *E.* 4. 30. 1 *H.* VI. 3.

If a Feme Covert has Iſſue by Adultery, yet if the Husband be able to get it, and is within the Four Seas, it is not a Baſtard. 1 *Roll.* 358. *Hil.* 14. *Jac.* But ſee 40 *E.* 3. 16. that if a Woman covert continues

nues in Avowtrie, and has Iſſue, it is a Baſtard.

Copy of Inſcription, Evidence.

MEMORANDUM at a Tryal at the Bar between *Baxter* and *Foſter*, concerning the Title of Land, a Copy of an Inſcription upon a great Stone in *London* was admitted in evidence to prove a pedigree. *Mich.* 1656. *Banco ſuper. Sti. Pract. Reg.* 177.

Jury throw up Croſs and Pile.

THE Court ſet aſide a Verdict in *Northumberland* on Affidavit, that the Jury being divided in opinion, threw Croſs and Pile, and ordered them to appear the next Term to an Information; this being puniſhable by *Wild*, and as was ſaid, broke Sir *James Altham*'s Heart, who was one of the Jury in the Lord *Fitzwater*'s Caſe. 3 *Keble* 805. *Foy* and *Harder*.

Church-Book, and Shop-Book, where Evidence.

A CHURCH-*Book* being entred, and made parcel of the Record, was given in Evidence, and good; but not otherwiſe to be given in Evidence. 1 *Brownl.* 207. 1 *Cro.* 411.

A Tradeſman's *Shop Book* may not be given in Evidence for Wares ſold, or Work done, a Year after the ſelling, *&c.* 7 *Jac. c.* 12. unleſs they have a Bond or Bill for the Debt, or brought Action within the Year.

Barriſter expelled the Houſe for not paying his Commons.

MR. *Boreman*, a Barriſter of one of the Temples, was expelled the Houſe, and his Chamber ſeiſed for non-payment of his Commons, whereupon he prayed to be reſtored, bringing his Writ of Reſtitution into Court, ready framed, which was directed to the Benchers of the ſaid Society; but 'twas denied by the Court, becauſe there is none in the Inns of Court to whom the Writ can be directed, becauſe it is no Body Corporate, but only a voluntary Society, and ſubmiſſion to Government; and they were angry with him for it, that he had waved the ancient and uſual way of Redreſs for any grievance in the Inns of Court, which is, by appealing to the Judges, and would have him do it now. 17 *Car.* in *B. R. March rep.* 177. cited alſo in *Stiles* 42.

Maſters

Maſters in Chancery.

MASTERS in *Chancery* in ancient time were Clerks of the Court, and called *The firſt Form*, and their Office was, and now is, to ſign Original Writs, and of late time they have obtained a Commiſſion to make them Judges: They are part of the *Latin* Court in Chancery, and were formerly Prieſts, and from thence they are called Maſters; the Lord Chancellor had the Benefices under Twenty Marks, to the intent to prefer theſe Maſters to 'em, and they could not marry 'till they were enabled by Stat. 14 *H.*VIII.*cap.* 8. They uſed anciently to frame the Writs, and are this day offended with the Curſitors for their Office. *Latch.* 39, and 133.

Husband and Wife in Affection reſolve to die together, ſhe buys Poiſon, both take it, the Husband dies.

A MAN and his Wife had lived a long time together, and the Man having at length ſpent his Subſtance, and living in great Neceſſity, ſaid to his Wife, That he was now weary of his Life, and that he would kill himſelf; the Wife ſaid, that then ſhe would alſo die with him, whereupon

upon he prayed her that she would go and buy some *Ratsbane*, and they would drink it together; which she accordingly did, and she put it into Drink, and they both drank of it; the Husband died, but the Woman took *Salad Oyl*, which made her vomit, and she recovered: *Quære*, if Murder in the Wife. *Moor* 754.

Prerogative.

PRÆROGATIVA is derived of *præ* i. e. *ante*, and *rogare*, to ask or demand before-hand, being denominated of the most excellent part; because, tho' an Act hath passed both Houses in Parliament, yet before it be a Law, the Royal Assent must be asked or demanded and obtained; this is the proper sense of the Word, but legally it extends to all Powers, Preheminences, and Priviledges which the Law gives to the Crown. *Forteſcue* 45. *Stanf. Prær.* 5. 10. 1 *Inſt.* 90 *b.*

According to this latter sense then, the King's Prerogative is not his Will, or (what Divines make it) a Power to do what he lists: *The King's Prerogative*, that is, *The King's Laws*: For Example, if you ask whether a Patron may present to a Living after six Months by Law? 'Tis answered, No: If you ask whether the King may, 'tis

'tis answered, he may by his Prerogative, *i. e.* by the Law that concerns him in that Case. *Selden.*

Husband and Wife divorced causâ Frigiditatis, *or impotency in the Husband, he marries again and has Issue, it is legitimate.*

In Ejectment between *Whebster* and *Burie*, a special Verdict was given upon Divorce between *Burie* and his Wife *Causâ Frigiditatis*, and that his Wife for Three Years after marriage, *remansit Virgo intacta, propter perpetuam impotentiam generationis in Viro, & quod Vir fuit ineptus ad generandum:* And in this special Verdict the whole examination of the Witnesses, upon which the Judge in the Spiritual Court gave Sentence, whereby the perpetual disability of *Bury ad generandum* was manifest, was read, by which it was pretended, that the Issue which he had by a Second Wife, was illegitimate, and this was the doubt of the Jury: But 'twas adjudged that his Issue by the Second Wife was lawful; for 'tis clear that by the Divorce *causâ frigiditatis*, the Marriage is dissolved *à vinculo*, and either might marry again, then admitting the Second marriage voidable, yet it is good until dissolved, and by consequence the Issue lawful (if no Divorce be in the life of the

Parties) *Et homo poteſt eſſe habilis & in habilis diverſis temporibus. Co.* 5. 98. *Burie's* Caſe.

One refuſes to be ſworn after the uſual manner.

DOCTOR *Owen*, Vice-Chancellor of *Oxford*, being a Witneſs in a Cauſe for the Plaintiff, refuſed to be ſworn according to the uſual manner, by laying his Right Hand upon the Book, and kiſſing it after; but he cauſed the Book to be held open before him, and he held up his Right Hand, and ſo was ſworn: Whereupon the Jury prayed the diſcretion of the Court, if they ought to eſteem his teſtimony as ſtrong as that of another Witneſs? *Glyn.* Ch. J. anſwered, that in his opinion the Dr. had taken as ſtrong an Oath as any of the other Witneſſes; but that for his own part, if himſelf were to be ſworn, he would, according to the accuſtomed way, lay his Right hand upon the Book: The ſame Anſwer which he gave before to another Jury. 2 *Siderf.* 6.

Jews ſworn upon the old Teſtament only.

ON Evidence to a Jury, the Witneſſes produced were Jews, and ſworn upon the Old Teſtament only: *Per Cur.* a good Oath by 5 *Eliz. c.* 9. to make Perjury: And within

within the general Words of *S. Evangelia*; ſo of the *Common-Prayer-Book* that hath the *Epiſtles* and *Goſpels*, *Contra* by *Windham* of a *Pſalm-Book* only. 2 *Reb.* 314.

Murder of a Child in the Womb.

One beats a Woman great with Child, and after the Child is born alive, with Signs and Bruiſes in his Body of the ſaid battery, and after dies thereof: *Fenner* and *Popham* held it to be *Murder*; for the difference is, where the Child is born Dead, and where Alive; in the firſt Caſe it is not *Murder*, becauſe *Non conſtat* whether the Child were living at the time of the Battery, or not, or if the beating were the cauſe of it's Death; but when it is born Alive, and the Wounds appear in his Body, and then dies, the Batteror ſhall be arraigned of *Murder*, for now it may be proved whether theſe Wounds were the cauſe of the Death, or not; and therefore if it be found, he ſhall be condemned. *Goldsb. Rep.* 176.

If a Woman quick with Child take a Potion to kill it, and accordingly it is deſtroyed without being born alive; this is a great Miſpriſion, but no Felony; but if born alive, and after dies of that Potion, it is *Murder*. *Dalt. c.* 93. *Hales tit.* Felonies.

Nemo tenetur prodere ſeipſum.

A MAN was ſued for Incontinency in the *Spiritual* Court, and the Judges there would have him anſwer upon his Oath if he ever had Carnal Knowledge of ſuch a Woman, upon which he prayed a Prohibition, and 'twas granted, for no one is obliged to betray himſelf in ſuch caſes of Defamation, but only in cauſes Teſtamentary and Matrimonial, where no diſcredit can be to the Party by his Oath. *Cro. Eliz.* 201. *Moor* 906. 4 *Leon.* 194. *Cullier's* Caſe.

Dr. *Hunt* was indicted, that being Commiſſary to the Arch-Deacon of *Norwich*, he cauſed *I. S.* to be Summoned before him, to compel him to take an Oath concerning Incontinency, which touched himſelf: It being referred to the Chief Juſtices, and Chief Baron, they certified, That where the Knowledge of the matter did belong to the Court Chriſtian, they may proceed according to the Civil Law: Note, the *King's Bench* was of opinion in this caſe, that the Oath cannot be miniſtred to the Party, but where the Offence is firſt preſented by Two Men. *Cro. Eliz.* 262.

If a Woman be Sued in the *Eccleſiaſtical* Court upon a Contract of Marriage, and enters

enters into Bond to the Court with condition not to Marry or live in Fornication with any one *pendente lite*, ſhe cannot afterwards be examined there upon her Oath, whether ſhe be a ſingle Woman, for that tends to the Forfeiture of the Obligation. 2 *Roll.* 305. *Clifford* and *Huntley.*

Baſtardy.

IF Husband and Wife continue Man and Wife their whole Lives, their Iſſue cannot be Baſtarded by a Divorce after their Death, for the Divorce in the *Spiritual* Court *eſt pro peccatis*, which cannot be after they are Dead, and therefore ſuch Divorce there is only to diſinherit the Iſſue, which they cannot do, 39 *E.* 3. 31. *b.* 32. for by ſuch means any one may be diſinherited. 31 *Aſſ. Pl.* 10.

Baſtardy.

IF the Wife of an Infant under Fourteen Years has Iſſue, it is a Baſtard. *Noy's Rep.* 142. 1 *Roll.* 359. 1 *H.* VI. 3. *b.*

If a Wife elope, and live in Adultery with another, and has Iſſue, yet by our Law the Child is legitimate, agreed *per Cur.* in *Edgerton's* Caſe, 1 *Roll.* 358. but

the Husband muſt be within the Four Seas, ſo as by Intendment he may come to her; otherwiſe ſuch Iſſue is a Baſtard. But *vide* 40 *E.* 16. 3 *b. contra.*

If a Feme Covert goes into another County, and takes Husband, and has Iſſue by him, the firſt Husband being within the Seas, the Iſſue is legitimate. 7 *H.* IV. 9. *b.*

A Married Man takes another Woman to Wife, his Iſſue by her is Baſtard by Common and Civil Law, for the ſecond Marriage is void. *Co.* 7. 44.

If there be an unlawful Marriage, as between Brother and Siſter, and they have Iſſue, and one of 'em dies before any Divorce had between them, the Iſſue cannot now be Baſtarded. (ſee *Co.* 7. 42. *Kenn*'s Caſe) 1 *Brownl.* 42. and 2. *Roll.* 357.

Upon a Motion to ſtay an Information brought againſt the Proſecutors of one *Brown* for a Baſtard, Juſtice *Twiſden* ſaid, that the Stat. 18 *Eliz. cap.* 3. ſhall be taken by equity, and that although *Baſtards* are intended *Children Born*, yet the Juſtices may take ſecurity of ſuch as are Big, or of reputed Fathers during that time, leſt they be gone before the Child is born, *Curia accord' ſed adjornatur. Lamb. I. P.* 119. 3 *Keb.* 708.

If

If a Man has Iſſue by a Woman, and after Marries her, by our Law the Child is a Baſtard; yet note, ſuch iſſue ſhall be called their Child in Law, for a Remainder limited to it by that name is good. *Co. 6. 65.*

If a Man Marry his Couſin within the degrees, the Iſſue between them is not Baſtard, until Divorce had, for the Marriage is not void; as it is where a Husband takes a ſecond Wife, living the firſt, and has Iſſue by her, it is a Baſtard, becauſe the ſecond Marriage is void.

An *Ideot à nativitate* may conſent to Marry, and his Iſſue ſhall be legitimate. *Stile* and *Weſt.* 1 *Roll.* 357. Fine.

Leaſe confirmed before it is made, yet good.

A Bishop made a Leaſe for Years the ſecond day of *May*, and the Dean and Chapter confirmed it the firſt of *May*; *Catlyne* and *Southcote* held it a good Leaſe after the Biſhop's Death: *Wray* demanded, How a Leaſe could be confirmed before it was made; the others anſwered, That the Aſſent before is a good Confirmation after, *Owen* 33.

Vide 2 *Roll.* 26. *Number* 30. that if a Parſon grant an *Annuity*, and the Patron ſeals and delivers a Deed of Confirmation be-

fore the Grant, and after the Grant delivers the Deed again, this second Delivery is void, for altho' by the first Delivery it took not effect as a Confirmation, but was void in operation (*quod nota*) yet it was his Deed, for he could not plead *Non est factum*. See 8 *H.* VI. 6. *b.* and 39 *H.* 6. 37. *b. contra.*

Where the Lord shall have the Land against his own Confirmation.

LORD and Tenant of a Carve of Land, the Tenant has Issue, and is attainted of Felony, and the King pardons him, and after the Lord confirms his Estate, and the Tenant dies, here the Lord shall have the Land against his own confirmation, for 'tis ruled in *Beaumont*'s Case, *Co.* 9. 141 *b.* that a confirmation cannot add a discendible quality to him that is disabled to take by descent. But *vide Cro. Car.* 478. by *Jones* and *Croke*, a Deed shall never be void when by any Intendment it may be allowed good, and to have any operation, and that altho' in *Beaumont*'s Case the Heir in tail was barred by the fine of his Ancestor, yet they hold he was restored to the Estate tail by the Confirmation of him in the Reversion; for as the Fine was an Estoppel to the Heir to claim against the

the Fine, ſo the Indenture of Confirmation is an Eſtoppel to him in Reverſion to ſay that the Heir ſhall not hold it in tail, and there it is an Eſtoppel againſt an Eſtoppel, which ſets the matter at large. See *Jones* 394.

Fine levied by a Woman born Deaf and Dumb.

ONE *Martha Eliot* that was born Deaf and Dumb came before Chief Juſtice *Bridgman* to levy a Fine; ſhe and her three Siſters had a Houſe and Land, and an Uncle had maintained her, and was to buy the Houſe and Land of them, and agreed to maintain this Woman, if ſhe would paſs her Land for Security: As to her intelligence, the Siſters ſaid, ſhe knew and underſtood the meaning of all this; the Chief Juſtice demanded what ſign ſhe would make for paſſing away her Lands, and as 'twas interpreted to him, ſhe put her Hands that way (ſpreading them out) where the Lands lay. This matter being communicated by the Chief Juſtice to his Brethren, Judge *Archer* (with whom *Tyrrel* and *Brown* agreed) ſaid, that the rule in Law is, that in Fines and Feoffments, *&c.* if there be a good intelligence, they may well do ſuch Acts, they may be admitted to make contracts for their good; They

They are allowed upon examination to Marry, and to receive the Sacrament, they may make contracts for their Persons, and by the same reason for their Lands; and so his Lordship took the Fine. *Cartor's Rep.* 53, 54.

Vide Perkins, Sect. 25. that one born Deaf and Dumb may make a gift, if he have Understanding, but that 'tis hard such a Person should have Understanding, for that perfect intelligence comes by hearing. And see 1 *Inst.* 8. *a.* that one born Deaf and Dumb may be Heir to another (tho' it was otherwise held in ancient time) and so if born Deaf, Dumb, and Blind, for in *hoc casu vitio parcitur naturali*; but note, it is there said that such persons cannot contract.

Alien suffers a Common recovery.

LAND was given to an Alien in tail, the Remainder to *I. S.* in Fee; the Alien suffered a Common Recovery, and died without Issue, all which being found by Office, the Court resolved the Recovery was good, and should bind the Remainder-Man. 4 *Leon.* 84.

Note, it has been adjudged, where an Alien and *I. S.* were Joint-Purchasers, and the Alien died, that *I. S.* should not have the whole by Survivor, but that the King should have the Moiety upon Office found.

The

The Wife of I. D. *levies a Fine with* I. S. *as his Wife, and* I. D. *can't prevent it.*

I. S. and the Wife of *I. D.* levied a Fine of her Lands, by the name of *I. S.* and *Jane* his Wife, *I. D.* came into Court, and ſhewed this matter, and prayed to ſtay the Fine, but the Court would not ſtay it, for the Court ſhall not determine loyalty of Matrimony; and if it be true that ſhe is not the Wife of *I. S.* it ſhall not hurt the rightful Husband. 2 *Roll.* 19. *Kebleth waite* and *Wade.*

Wife prays the Peace againſt her Husband.

On a difference between the Lord *Leigh* and his Lady about *Pin-Money*, *viz.* the ſettlement of 200*l. per annum* in caſe of Separation; ſhe upon Affidavit of hard Uſage, and that ſhe went in fear of her Life, prayed ſecurity of the Peace againſt him, and 'twas granted: Note, *Hale* Chief Juſtice ſaid here, the *Salvâ Moderatâ caſtigatione* in the Regiſter is not meant of Beating, but only of Admonition and Confinement to the Houſe in caſe of her Extravagance, *Curia acc'* ſhe being not as an Apprentice, *&c.* but they were reconciled afterwards. 3 *Keb.* 433.

See

See 1 *Keb.* 637. *Bradley's* Caſe. The Court refuſed to bind him to the Peace at his Wife's Suit, unleſs her Life were in danger, becauſe by the Law he has power of Caſtigation; and the Biſhop of *London* had certified that he uſed to beat her, but that ſhe uſed to provoke him.

Fine Sur Grant & Lender, Executory.

A MAN by Fine acknowledges all his right in certain Land to me, and I render it back again to him in Fee, where neither of us hath any thing in the Land, and after I purchaſe the Land, this Fine ſhall bind me, for it was executory upon me. 2 *Roll.* 20.

Witneſs excuſed from ſwearing the whole Truth.

IN a Cauſe between *Sparke* and Sir *Hugh Middleton*, Mr. *Aylet* having been Counſel for the Defendant, deſired he might not be ſworn on the general Oath, as Witneſs for the Plaintiff, to give the whole Truth in evidence, which the Court granted after ſome diſpute; and that he ſhould only reveal ſuch matters as he either knew before he was of Counſel, or that came to his knowledge after from others; and the particulars to which he was ſworn were

were particularly propoſed, *viz.* what he knew concerning a Will in queſtion that *P. G.* made; and the Court only put the queſtion, Whether he knew of his own Knowledge? 1 *Keble* 505.

See *Stiles* 449. *Waldron* and *Ward*, That a Counſellor is not bound to make anſwer to matters which may diſcloſe the ſecrets of his Client's cauſe, by *Roll.* Chief Juſtice; and ſo he was forborn to be examined.

Vide March 83. *pl.* 136. that a Lawyer of *Counſel* may be examined upon Oath as a Witneſs to the matter of Agreement, not to the validity of an Aſſurance, or to the matter of Counſel.

Extinguiſhment.

If a Man Leſſee for Years take the Feme Leſſor to Wife, his Term is drowned, for a Man cannot have a Term for Years in his own right, and a Free-hold *in auter droit* to conſiſt together. 1 *Inſt.* 338. *b.*

Baron Leſſee for Years, and the Inheritance deſcends to his Feme, Reſolved *per Cur. præter Williams*, That here the Term is not extinct. 2 *Cro.* 275. So note a difference where the Feme has the Reverſion before Marriage, and where the Fee deſcends

ſcends to her after Marriage. *Jenkins cent. fo.* 73. the firſt is the Act of the Husband, the other the Act of the Law, which ſhall not prejudice him.

If a Man Leſſor Marry the Feme Leſſee, the term is not drowned, but he is poſſeſt of it in her right during the Coverture: So if the Leſſee make the Leſſor his Executor, the term remains; for a Man may well have a Free-hold in his own right, and a Term *in auter droit*. *Pl. Com.* 418. 1 *Inſt.* 338. *b.*

Feme Leſſee for Years takes Husband, he purchaſes the Fee, the term there is extinct by the Act of the Husband which deſtroys it, *viz.* the purchaſe, but where he had the Reverſion before, her Term ſhall continue, for the Act of the Law ſhall not prejudice. 4 *Leon.* 212.

An Executor hath a Term, and purchaſes the Fee, the Term is determined, by *Dyer.* 4 *Leon.* 212.

Counſeller and Client.

If a Counſeller ſay to his Client, that ſuch a Contract is Simony, and the Client makes anſwer, That Simony or not Simony he will do it, and thereupon the Counſellor maketh this Simonaical Contract,

tract, it is no offence in him, by *Reeve* Juſtice. *March* 83. *pl.* 136.

Carrier robbed, allowed a Witneſs to prove the Robbery.

IT was ſaid by Chief Juſtice *Glyn*, that a Carrier who is robbed, may be examined as a Witneſs at a Tryal thereupon, to prove the Robbery, and what he was robbed of, otherwiſe the truth can't be known: But this is the only Caſe, he ſaid, where one may be admitted to give his teſtimony as a Witneſs in a matter which concerns himſelf. *Stiles Pr. Reg.* 571. *Warren*, and the Hundred of *Broadwater*.

Examination of a Witneſs.

IN examining a Witneſs, Counſel cannot queſtion all the Life of the Witneſs, as whether he be a Whoremaſter, *&c.* but if he hath done any notorious fact, which gives juſt exception againſt him, this may be taken, and he may be excepted againſt. *March* 83. *pl.* 136.

What Sergeants Rings ought to weigh.

SEVENTEEN Sergeants being made the Fourth of *November*, 21 *Car.* II. Serjeant *Powis* coming (a day or two after) to the King's-Bench Bar, Chief Juſtice *Keeling* told him, he had ſomewhat to ſay to him, *viz.* that the Rings which he and the reſt of his Brethren had given, weighed but 18 *s.* apiece, whereas *Forteſcue* ſays in his Book *de laudibus Legum Angliæ*, that the Rings given to the Chief Juſtices, and Chief Baron ought to weigh 20 *s.* apiece; and that he ſpake this not expecting a Cecompence, but that it might not be drawn into a Preſident, and that the young Gentlemen there might take notice of it. See the *Mod. Rep.* 9.

Legatee allowed as a Witneſs to prove the Will.

ONE that has but a ſmall Legacy given him by a Will, may be allowed as a Witneſs to prove that Will, for the Law will not intend that any one will forſwear himſelf for a ſmall matter. *Stiles Pr. Reg.* 568. but ſee *Stiles Rep.* 370. *initio.*

A Man brings Debt againſt his own Executors.

VIDE 1 *Inſt.* 133. *b.* that in ſome Caſe a Man might have had an Action of Debt againſt his own Executors; as if *A.* had been bound to the Abbot of *Dale* in an Obligation, and afterward *A.* had been profeſſed a Monk in the ſame Abby, and after were made Abbot thereof, he ſhould now have had an Action of Debt upon his own Bond againſt his own Executors.

Note, when a Man entred into Religion, he might make his Will and his Executors, and they ſhould have had an Action for a Debt due to him before his entry into Religion, or any other Action that Executors may have, as if he had been dead indeed, *pari ratione* they might be alſo ſued, and in the Caſe *ſupra*, the Bond being made to an Abbot by one who after became dead in Law, by entring into Religion, whereby his Executors became chargeable, *&c.* when he himſelf was afterwards reſtored to legal Life by being made Abbot, the Debt being unſatisfied, himſelf was then the only Perſon capable of ſuing for it.

Where a Feme Covert ſhall have both an Executor and Adminiſtrator.

THE Wife of *I. S.* having Debts due to herſelf, and being alſo Executrix to *I. D.* makes (without her Husband's aſſent) *I. N.* her Executor, and dies: Here as touching the Goods, and Credits, or Things in Action, pertaining to her as Executrix of *I. D.* this Will ſtands good, and *I. N.* may prove it, contrary to her Husband's Will: But as to the Credits to her ſelf in her own right pertaining, the Will is void, and thereof her Husband may take Adminiſtration: So Note, ſhe ſhall die both Teſtate, and Inteſtate; with a Will, and without a Will; ſhall have both an Executor, and Adminiſtrator. *Office of an Executor*, 281.

Pleaſant Cuſtome.

BY a Cuſtome which they have in the Town of *Southampton*, if a Baſtard Child be found within the Town, and the Father of it cannot be diſcovered, he that comes next into the Town, after the Child was found, muſt keep the Child. *Mich.* 24 *Car. B. R. Stiles* Practical Regiſter 105. It may be (ſays *Stiles*) they of the Town did time out of mind agree amongſt themſelves

ſelves that it ſhould be ſo, and therefore it ſhant be adjudged an unreaſonable Cuſtome, tho' it ſeems a ſtrange one.

Cuſtome to hang for Stealing a Capon, not for Stealing an Ox.

THERE are ſeveral Cuſtomes which are good *ratione loci*, that are not allowed throughout *England*; as there is a Cuſtome in the Iſle of *Man*, that a Man ſhall be hanged for ſtealing a Capon, yet he ſhall not be hanged for ſtealing an Ox. 12 *H.* VIII. 5. 1 *Siderf*, 267.

Cuſtome in Cheſhire.

THERE is a Cuſtome in *Cheſhire*, that if a Debtor come before the Chamberlain of *Cheſter*, and there takes his Oath that he is not able to pay the Debt, but that he will pay it as ſoon as he can, that he ſhall have a Protection. See 1 *Roll.* 566, 567.

Note, Whereas by the Cuſtome of *London*, an Action upon the Caſe lies for calling a Woman *Whore*; and ſo likewiſe in the Court of the Borough of *Southwark*, (where they alledge a Cuſtome ſpecially for Whipping and Carting of Whores) it lieth likewiſe for a Lodger, for ſhe

comes within the Customs, which reach to all the Inhabitants.

One loses at Play more then 100*l.* *to several Persons.*

DEBT upon Bond, the Defendant pleads the Stat. 16 *Car.* II. *cap.* 7. against Gaming that he lost at [*Most at Three Throws*] 90*l.* to the Plaintiff, and at the same time 30*l.* to *A.* at *Cards*, and 60*l.* more to *B.* at *Bett*: The Plaintiff demurred, because it does not appear that these were Parties together, or in trust one for the other; and in *Danver's* Case the Act was held to extend only to the security for more than 100*l.* much less shall it extend to different Gamesters. But the Court agreed, it was not material to whom the Party became indebted; for the Statute is, That you shall not lose more than 100*l.* at one time or meeting upon Ticket; and Judgment was given for the Defendant, the Statute being to be extended against Play. 3 *Keb.* 671. *Hudson* and *Malim.*

Danvers his Case was thus, (1 *Siderf.* 394.) Bond was given for 100*l.* lost at Play, there being lost at the same time a Ring of 20*l.* value, which was paid, and adjudged the Bond was not void within the Statute, the design whereof was to avoid Securi-

Securities, but did not regard ready Money, as not presuming that Persons would carry their Estates in their Pockets: Therefore *Keeling* said, If one lose 1000 *l.* in ready Money and also give Bond for 100 *l.* it is not within the Statute.

Two Joynt-Tenants hanged in one Cart, the Survivor's Wife demands Dower.

In a Writ of Dower, the Title of the Feme to recover Dower was this: Father and Son were *Joint-Tenants* to them and the Heirs of the Son, they committed Felony, and were both hanged in one Cart, but because the Son (as it was deposed by Witnesses) did survive, as appeared by some Tokens, *viz.* his shaking his Legs; his Wife thereupon demanded Dower, and upon issue *nunques seisie que Dower*, it was found for her. *Cro. Eliz.* 503.

For the better understanding of which Case, I shall give you the following Opinion: If there be two Joint-Tenants in Fee, and one of 'em is attainted of Felony, and then the other dies in the Life of him that was attainted, his part shall survive to him that was attainted, by *Brampston*, in the Case of *Harris* and *Wardell*, 2 *Roll.* 88. and he held that the Lord of whom the Lands are holden should not have this

part by Attainder if he were afterwards pardoned: But *Berkley* conceived that he ſhould forfeit by his Attainder all the Land which comes to him during his Attainder, and ſo the Lord ſhould have this Moiety alſo.

A. and *B.* Joint-Tenants, *A.* is attainted and hanged, yet there is no ſeverance of the Jointure, but the Land ſhall ſurvive to *B.* untill the Lord enter for the forfeiture. *Harris* and *Wardell's* Caſe. 2 *Roll.* 88.

Plea in Bar of Dower.

A Woman brought a Writ of Dower in *Kent*, and demanded the third part of certain Lands, whereof her Husband was ſeiſed; the Tenant pleaded in Barr, That the Lands were of the nature of *Gavelkind*, whereof by Cuſtome ſhe is to have a Moiety for her Dower, and adjudged a good Plea in Barr, *quod nota*, *Savil's Rep.* 91.

Where a Right of Free-hold ſhall drown in a Chattel.

If a Diſſeiſor make a Leaſe for Years, the Diſſeiſee cannot releaſe to him, becauſe he hath no Eſtate of Free-hold: And yet in ſome caſe a right of Free-hold ſhall

ſhall drown in a Chattel, as if a Feme hath a right of Dower, ſhe may releaſe to the Guardian in Chivalry, and her right of Free-hold ſhall drown in the Chattel, becauſe the Writ of Dower lies againſt him, and the Heir ſhall take advantage of it. 1 *Inſt.* 266. *a.*

Coparceners, but one Heir.

A. MAKES a gift in Tail, reſerving 2 *s.* Rent to himſelf during his Life, and if he die, his Heir within age, then a Rent of 20 *s.* to his Heirs for ever; *A.* dies, having Iſſue two Daughters, one of full age, the other within age; here the Donee ſhall hold by Fealty only, inaſmuch as the one Daughter as well as the other is his Heir, and both of 'em make but one Heir, *ergò* his Heir is not within age, neither is his Heir in that Caſe of full Age: But if the reſervation had been, and if he die, his Heir neither within age, nor of full age, there it had been good; note, if it begins not in his next heir, it ſhall never begin, becauſe the precedency is not performed. 1 *Inſt.* 164. *a.*

Special Tail.

LAND is given to *I. S.* and to the Heirs which he ſhall engender on the Body of an *Engliſh* Woman, he Marries a *French* Woman, and ſhe dies, and then he Marries an *Engliſh* Woman; this is now a good Eſtate in ſpecial Tail, by *Cataline*. *Owen's Rep.* 32.

One Tenant in Common takes all.

IF there be two Tenants in Common of Timber, or other Goods, and one of them takes the Timber, and puts it into his ſeveral Land, the other cannot juſtifie his entry into the Land to retake it, for inaſmuch as in Law 'twas no tort for him to take it all to his own uſe, by reaſon of the Truſt that is between them; the other cannot juſtifie a Treſpaſs in the Land to retake it, but muſt take it when he may without doing a Treſpaſs. 2 *Roll.* 566. *Maſters* and *Polley*.

One Ship takes another in the preſence of a third.

THE Civil Law is, That if two Ships meet at Sea together, altho' they went not forth

forth as Conſorts, yet if one of them in the preſence of the other take a Ship with Goods in it, the other ſhall have a Moiety of the Ship and Goods taken, for her preſence there at the time of the taking, was a Terror to the Ship which is taken, *ſine quo* the other Ship could not ſo eaſily have taken her. 2 *Leon.* 182.

Tenant in Common with himſelf.

If Lands be given to *John* Biſhop of *Norwich*, and his Succeſſors, and to *John Overal*, Doctor of Divinity, and his Heirs, being one and the ſame Perſon, he is Tenant in Common with himſelf, for he takes both in his natural and politique capacity, which in ſuch caſe cannot ſtand in Jointure, therefore it is a Tenancy in common: But note, This Rule holds not in Chattels reals and perſonals; for if a Leaſe for Years be made, or a Ward granted to a Biſhop and a Secular Man, or if Goods be granted to them, they are Joint-Tenants, becauſe they take not in their politique capacity. 1 *Inſt.* 190. *a.*

See 2 *Roll.* 91. between the Dean and Chapter of St. *Peter's* of *York* and *Power*: One entred into an obligation to the Dean and Chapter of *York*, and to *A. B.* and *C. D.* of 2000 Marks; the Dean and Chapter

are

are Tenants in Common with *A. B.* and *C. D.* for that the Body politique having a ſeveral capacity from the Body natural, cannot take in Jointure with it. *Vide Ley's Rep.* 82, *acc*[3] that if an Obligation be made to *I. S.* and a Corporation, and *I. S.* die, the Obligation ſhall not ſurvive, but the Corporation, and the Executors of *I. S.* muſt join in Suit.

Where one may vouch himſelf.

A MAN ſhall not regularly vouch himſelf, as Aſſignee of a Fee-ſimple, for the Law will not ſuffer things inutile and unprofitable; and yet if the Father be enfeoffed with warranty to him and his Heirs, and he enfeoffeth his Heir apparent in Fee, and dies, he (as it is ſaid) ſhall vouch himſelf, and the Heir in Borough *Engliſh*, by reaſon that the Act in Law determined the Warranty between the Father and the Son. 1 *Inſt.* 390. *a.*

See *Plowd. Com. fol.* 7. *b. Manxel's* Caſe, that if a Father being enfeoffed with warranty, enfeoffeth his Son and Heir with warranty, and dies; the Son in a Præcipe brought againſt him may vouch the Feoffor of his Father, for the Law will not ſuffer him to vouch himſelf, and when he comes in as Vouchee, then to deraign the

the firſt Warranty, for the circuit of Voucher. *Vide Finch*'s Law. 55.

A. *mixes his Money with* B's *at play, and* B. *keeps it all.*

A. And *B.* being at Play, *A.* thruſt his Money into *B*'s heap, and mixed it, and *B.* kept it all, whereupon (they ſtriving for the Money) *A.* brought Treſpaſs of Aſſault and Battery, *& quod cumulum pecuniæ*, containing Five Marks, *cepit*; and the whole Court was of opinion, in regard the Plaintiff's own Money cannot be known, and this his intermedling is his own Act, and his own wrong, that by the Law he ſhall loſe all; for if it were otherwiſe, a Man might be made to be a Treſpaſſer againſt his Will, by the taking of his own Goods, to avoid which inconvenience, the Law will juſtifie the Defendant's detaining all: *Querens nihil capiat per Billam.* 2 *Cro.* 366. *Ward* and *Ayres.* and 2 *Roll.* 566.

So if I voluntarily intermingle my Corn with another Man's, he may take all. *ibid.* and 1 *Siderf.* 38. the end, *accord*' by the Chief Juſtice.

Action

Action for playing with false Dice.

A. ENTICED *B.* to play with him at *Dice*, at a Game called *Passage*, whereupon he played with him, and when it came to *B*'s turn to throw, *A.* delivered in true and fair Dice, with which he play'd, but when it fell to his own turn, he threw with false Dice, such as he knew would run *Five* or *Six* upon every Die, and so *B.* lost 10 *l.* whereupon he brought an Action upon the Case for this Deceipt, and recovered. 1 *Roll.* 100. *Hartwell* and *Oak*'s Case.

Note, It was resolved in *Martin Leeser*'s Case, That if common Players with false Dice, to cozen the People at Play, do enter into the House of another Man, and desire him to play at Dice, and with their false Dice cozen him of his Money by Play, altho' this be not Felony, nor an Offence for which he shall lose Life or Member, yet he shall be set upon the Pillory where the Offence was committed. 2 *Cro.* 497, 498.

Motion to quash an Indictment against two for being Common Players at *Cards*, and defrauding the Plaintiff of 40 *s.* not saying *Vi & Armis*; but, *per Curiam*, it's needless. 2. to say, *Angl.* a Trick at Cards, without

without a *Latin* Word, there being none for it, is good. 1 *Keb.* 652.

Where the Owner may retake his Goods, tho' altered in Form.

A WRONG-Doer cuts down Trees, and carries them away, and makes Timber or Boards of 'em, yet may the owner retake 'em in the Land of the Tort-feasor: For in all Cases where a thing is taken wrongfully, and altered in Form, yet if that which is the principal part of the substance remains, the notice of the thing is not lost; as if a Man should tortiously take away my Cloak, and make himself a Duoblet of it, yet I may retake it from him. So if one take from me a Piece of Cloth, and after sow Silver or Gold into it, yet I may take it from him, *Quia major pars substantiæ remanet. Moor. pla.* 67.

Note, If *I. S.* bequeaths a Pack of Wool to *I. D.* and after the Testator converts it into Cloth, and dies possessed of it, *I. D.* shall not have the Cloth. *Doderidge* English Lawyer, 132.

Where

Where Property ſhall not be altered by a Sale in Market Overt.

'Tis the opinion of ſome, that the Goods of a Bankrupt, tho' he has ſold them in Market Overt, are, notwithſtanding that liable to the ſale of Commiſſioners, by *Twiſden*: And 'tis clear they are liable if ſold out of Market Overt. 1 *Siderf.* 272. *initio.*

See *Dyer, fol.* 99. *placito.* 68. A Man bought ſtoln Beaſts out of Market, and gave Five Shillings to have election to refuſe in the Market to be holden the next Day, and then in the Market he agreed to have the Beaſts, and payed Toll: It was held in this Caſe that the property was not altered, for that the Agreement relates to the Contract out of the Market, *quod nota.*

In Trover by *Gibbs* againſt *Baſil* for a *Gelding*, the Caſe was; one *Porter* ſtole this Gelding from the Plaintiff, and ſold him to the Defendant in open Market by the name of *Liſter*, and 'twas entred ſo in the Toll Book that *Liſter* ſold him. This is no good ſale to bar the Plaintiff, for the Stat. 2 and 3 *Philip* and *Mary*, *cap.* 7. provides, that no property of ſtollen Goods ſhall be altered that are ſold, unleſs the Name aud

Sir-

Sirname of the Parties to the ſale be entred in the Toll Book. *Owen* 27.

Juſtification.

If a Man hath a heap of Corn by my heap of Corn, and he takes a handful out of my heap, I may take a handful out of his, and juſtifie, for he ſhall not take advantage of his own wrong. 2 *Roll.* 566. *n.* 10.

To juſtifie the taking another's Goods without being a Treſpaſſer.

If one Saddles my Horſe, and then puts him into his own Ground, I may well come and take my Horſe out, and keep the Saddle, and not be liable to Treſpaſs for ſo doing; and becauſe he puts his Saddle upon my Horſe, I may juſtifie keeping it, 'till he brings Action to recover it: So if one load my Cart with his Corn, or my Boat with his Coals, or the like, I may well take my Cart, and Boat away, and keep and detain the Goods without being a Treſpaſſer, 'till he bring a Detinue to recover 'em from me. 1 *Bulſ.* 96.

Demurr

Demurr to a Demurrer.

NOTE, One may demur to a Demurrer for the doubleneſs of it, for a Demurrer ſhould be formal and certain to avoid Barbariſm and inveigling the Court, but if he demurs not to it when he may, but joyns in the Demurrer, he hath now ſlipped the advantage, and he cannot demurr afterwards.

A Demurrer is double, when he that demurrs aſſigns therein for cauſe of it, one Error in Fact, and another in Law, which he ought not to do, for if either of the Cauſes be true, it is ſufficient to overthrow the Plea, and it is at his liberty to inſiſt upon that which is beſt for his own advantage, but not upon both, for this were to puzzle the Proceedings. See *Stiles Pract. Reg.* 133.

Acceſſary to an Acceſſary.

IF one felonioufly receive another that is an Acceſſary to a Felony, the Receiver is an Acceſſary. *Stamf. lib.* 1.

One

One of ill fame demands the Rent without Authority, &c.

LEASE for Years rendring Rent, with re entry for Non-payment; at the day a Stranger came to demand the Rent, the Leſſee asked him by what Authority, and becauſe he was a couzening Fellow, and notoriouſly infamous, and would not ſhew any Authority from the Leſſor; the Leſſee would not pay the Rent, and ſo the Leſſor entred, and adjudged lawful, for that a command to receive Rent may be by Parole. *Cro. Eliz.* 22. Sir *John Souch's* Caſe.

Serjeant *Moor* reports a Caſe (without Name) in the ſame Year with this, but another Term: A Leaſe for Years upon condition to re-enter for not-payment of the Rent; at the laſt day there came upon the Land a Man of an ill fame, who was Out-lawed in Forty Actions, and converſed all the day with the Leſſee, but ſaid not a Word for what cauſe he came, and at the laſt inſtant of the day, he demanded the Rent; the Leſſee asked him what authority he had to receive it, he anſwered he was ſent thither by the Leſſor; but ſhewed not any authority to prove his meſſage, nor was he known to be Recei-

ver or Servant to the Lessor: Upon the whole matter, the Judges were of opinion, that if any would swear this to be true, the Lessor ought not to enter; whereupon one was immediately sworn, who deposed that this Person was a Man of ill fame, and the Notes of the Records of the Out-lawries were shewn, and so the Lessee was discharged, *quod nota*. *Moor* 141. *numb.* 282.

Verba fortius accipiuntur contra proferentem.

If I grant a Rent of ten Pounds to Baron and Feme, and if the Baron die, that the Feme shall have three Pounds Rent, here because these Words rest ambiguous, whether I intend three Pounds by way of increase, or three Pounds by way of restraint and abatement of the former Rent of ten Pounds, it shall be taken strongliest against me that am the Grantor, that it is three Pounds addition to the Ten: But if I had let Land to Baron and Feme for three Lives, reserving ten Pounds *per annum*, and if the Baron die, reserving three Pound, this shall be taken contrary to the former Case, to abridge my Rent only to three Pound. 8 *Ass. p.* 10. See *Bacon's Elem.* 11.

Deed

Deed good without Delivery.

'Tis commonly ſaid that every Deed ought to have *Writing*, *Sealing*, and *Delivery*, and when any thing paſſeth from one that hath no Underſtanding but by his hearing, as a Blind and unlettered Man, the Deed ought to have Reading too; yet Note, In ſome Caſe a Deed ſhall be good without any Delivery; as the Deed of a Corporation aggregate, for the affixing of their common Seal gives perfection to it without any Delivery; as if a Dean and Chapter put their Chapter Seal to a Deed, it is a perfect Deed without any more. *Davies Rep.* 44. *b.* *Cro. Eliz.* 167. 2 *Roll.* 23.

Vide Savil 49. where *Manwood* is of the ſame opinion, *viz.* that a Confirmation by the Dean and Chapter to confirm Leaſes made by the Biſhop, needs not any Delivery of the Deed, but that 'tis good if it be Sealed, tho' it remain continually in the Chapter-Houſe; but Baron *Shute* held, that ſuch Deed is not of any effect without Delivery, and 'tis there left a *Quære*.

Slander, Daffidowndilly.

ONE ſaid in the *North*-Country that *I. S.* was a *Daffidowndilly*, and adjudged actionable, becauſe by this Word is meant there an *Ambidexter*, being a Flower of party-colour. *Hetl.* 123. *Noy* 98. the end. See *Cro. Eliz.* 914.

Thus to ſay of one in *Devonſhire*, and thereabouts, *He is a Healer of Felons*, will bear an Action, for it is taken there for a hider or concealer of Felons, and they uſually ſay, *The Healer is as bad as the Stealer. Yelv.* 153. *Noy.* 133.

So to ſay of one in ſome Countries, *He hath ſtrained a Mare*, where it is taken for, *He hath ſtoln a Mare*, or *Buggered a Mare. Yelv.* 153. *March pl.* 3. 2. *Bulſ.* 146. *Cro. Eliz.* 250. *Moor* 419. *ca.* 574.

So to ſay of a Man in *Northumberland*, *Weſtmorland*, &c. *He is an out-putter*, where 'tis meant a *Horſe-ſtealer*. 2 *Bulſ.* 146.

See *Hob.* in ſeveral places, for ſuch particular Words.

Where one ſhall loſe his Goods without any default in him.

THERE be divers Caſes (ſaith St. *Germyn*) where one ſhall loſe his Goods, and no

no default in him; as where Beasts stray away from a Man, and are taken up and proclaimed, and the Owner has not heard of 'em within the Year and the Day, tho' he made sufficient diligence to have heard of 'em, yet the Goods are forfeite and no default in him: So it is whe one Man kills another with the Sword *I. S.* the Sword shall be forfeit as a Deodand, and yet no default is in the owne. *Dr.* and *Stud lib.* 2. *cap.* 51.

Note, In case of Deodands, as to things fixed to the Freehold, the Law is taken to be clear otherwise now than it was when *Briton* and *Horne* wrote, who say, That if a Man fall from a Mill, House, or Tree, these shall be forfeited, for the Law will not suffe that a Man shall lose his Inheritance by another's negligence, where there is no default in himself.

Tenant for Life makes a Lease for Years, and after enters upon the Termor, and commits waste, and the Lessor recovers, the Lessee shall lose his Term.

Tenant by Curtesie.

A Seisin in Law of Lands in Fee descends to a Feme Covert, and the Lands are in the County of *York*, but the Husband and Wife are dwelling in *Essex*, and

the Wife dies within a Day after the deſcent, ſo that the Husband could not enter during the Coverture for the ſhortneſs of time, yet it is ſaid he ſhall not be Tenant by the Curteſie, and yet there is no default in him according to common pretence; but they ſay he might have ſpoken (before the Anceſtor's Death) to one dwelling near the place where the Lands lay, to enter in his Wife's right immediately after the Anceſtor's Death. *Perk. Sect.* 470.

See *Perk. Sect.* 469. that altho' the Day of payment of the Rent do incurr in the Life of the Wife, and ſhe die before any demand made of the Rent by the Husband, that yet there he ſhall be Tenant by the Curteſie.

Exchange.

EXCHANGE of Land in *Ireland* for Land in *England* is good. 10 *E.* 3. 42. *Palmer's Rep* 459.

A Man Indicted for maiming himſelf.

ONE *Wright*, a young, ſtrong, and luſty Rogue, cauſed his Companion to ſtrike off his left Hand, to make himſelf impotent, and have thereby the more colour

to

beg, or be relieved, without putting himself to any labour; both of 'em were indicted, fined, and ransomed for it: This was in my Lord *Coke*'s Circuit, *Anno* 11. *Jac.* I. with the opinion of the other Judges. 1 *Inst.* 127. *a. b.*

The life and members of every Subject are under the safeguard and protection of the King, to serve Him and their Country, when occasion shall be offered, which is the reason that a Lord could not maim his Villain, but the King should punish him for maiming his Subject by Fine, Ransome, and Imprisonment, *&c.* because hereby he hath disabled him to do the King service. *ibid.*

One Fined for disturbing of the Court.

ONE *Coxe* was Fined, *ad Curiam visum Franc. Plegii & Baronis*, because he put on his Hat in the Presence, and in Contempt of the Court, and of the Lord, and said, *He cared not what He could do*, and hindered the Business of the Court, *Inciviliter se gerens.* 1 *Keb.* 451. and 465.

Words Treason.

ARTHUR *Crobagan*, an *Irishman*, was arraigned of Treason for speaking these

Words at *Lisbon*, *I will Kill the King* [inuendo Dominum *Carolum* Regem *Angliæ*.] *if I may come unto him*; and about Two Years after, he came into *England* for the ſame purpoſe: He pleading *Not Guilty*, was tried by a *Middleſex* Jury, and 'twas directly proved by two Merchants, that he ſpake thoſe Words on Ship-board at *Lisbon*, in great heat of Speech, with one Captain *Bask*, and added [*Becauſe he is an Heretick*] and becauſe his Traiterous Intent, and the Imagination of his Heart is declared by theſe Words; it was held High Treaſon by the Common Law, and within the expreſs Words of 25 *Edw.* III. and he being arreſted by Warrant for this cauſe, moſt inſolently put his Finger into his Mouth, and ſcornfully pulling it out ſaid, *I care not this for your King*, &c. He was found guilty, and had Judgment accordingly. He confeſſed he was a *Dominican* Frier, and made Prieſt in Spain, and altho' this and his returning into *England* to ſeduce the Liege People be Treaſon by Stat. 23 *Eliz.* yet the King's Attorney ſaid, he would not proceed againſt him for that, but upon 25 *Edw.* 3. of Treaſon. *Cro. Car.* 332, 333. See *Cro. Car.* 125. that no Words are Treaſonable unleſs made ſo by ſome Statute. and 3 *Inſt.* 14.

Whether

Whether 'tis a Nuisance for a Rope-dancer to erect a Stage, &c.

JACOB *Hall* the famous Rope-dancer had erected a Stage in *Lincoln's Inn-Fields*, but upon a Petition of the Inhabitants, there was an Inhibition from *Whitehal*: Now upon complaint to the Judges that he had erected one at *Charing-Cross*, he was sent for into Court, and the Chief Justice told him he understood it was a Nuisance to the Parish, and some of the Inhabitants being in Court, said, it occasioned Broils and Fightings, and drew so many Rogues to that Place, that they lost Things out of their Shops every Afternoon. *Hales* said, that in 8 *Car.* I. *Noy* prayed a Writ to prohibit a *Bowling-Ally* erected near St. *Dunstan's* Church, and had it. *Modern Rep.* 76. *Post.*

Information for keeping a Cock-pit.

ONE *Howel* being Convicted of keeping a common Cock-pit six Days, was fined 12 *l.* the Court conceiving it an unlawful Game, and took their Measures by 33 *H.* VIII. *c.* 9. of 40 *s.* a Day, tho' the Information were at Common Law. 3 *Keb.* 465. and 510.

Forfei-

Forfeiture of a Copyhold.

A. Lord of a Mannor holding of his Court; and *B.* a Tenant being in the Court, there arising a Question whether the Court were then legally held, *B.* was asked if he appeared or not? he answered, *If it be a legal Court I do appear, but if it is not a legal Court, I do not appear: Quære,* if this be an appearance, or such a refusal to appear, whereby the Copy-holder shall forfeit his Copy-hold, or not. *Roll* Chief Justice said, if there was a real Controversie whether the Court was well held or not, it would be hard to make it a Forfeiture, but if not, and that the Words were used only as a Shift to avoid his Suit and service, it is a Forfeiture for the Words are like *Jack in a Box,* and no body knows what to make of 'em; the other Three Judges inclined it was no forfeiture. *Stiles* 241. *Parker* and *Cook.*

Rope-dancing. Ante.

The Court being informed that *Jacob Hall* was building a Booth for dancing on the Ropes at *C.* sent for him and the Workmen by a Tipstaff, and because he would not enter into a Recognizance not to build

build on, they committed him, and then he ceaſed. 2 *Keb.* 846.

Replevin of Goods not deſtreined.

REPLEVIN is the bringing of the Writ *De Replegiari facias* by one whoſe Cattle or Goods are diſtreined, *&c.* and putting in Surety to the Sheriff, that upon delivery of the Diſtreſs, he will proſecute the Action againſt the Diſtreinor. Yet Note, In a ſpecial Caſe a Man may have a Replevin of Goods not deſtreined; as if there be Lord Meſne and Tenant, and the Meſne put in his Cattle in lieu of the Cattle of the Tenant *paravaile*, whom he is bound to acquit, he ſhall have a Replevin of thoſe Cattle, yet they never were diſtreined. 1 *Inſt.* 145. *b.*

Replevin lies, notwithſtanding a grant to keep the Diſtreſs againſt Gages and Pledges.

IF a Rent be granted with clauſe of Diſtreſs, and further, that the Grantee ſhall keep the Goods diſtreined againſt Gages and Pledges, 'till the Rent be paid, yet ſhall the Sheriff replevy the Goods, for 'tis againſt the nature of ſuch a Diſtreſs to be irrepleviſable, and by ſuch an intention the Currant of Replevins ſhould be

be overthrown, to the hinderance of the Commonwealth, and ſo 'twas diſſallowed by the whole Court, and awarded that the Defendant ſhould gage deliverance, or elſe go to Priſon, which the Lord *Coke* ſaies, in his opinion, is an excellent point of learning. 1 *Inſt.* 145. *b.*

Witches.

THE Law againſt *Witches* does not prove there be any, but it puniſhes the Malice of thoſe People that uſe ſuch means to take away Mens Lives. If one ſhould profeſs that by turning his Hat thrice, and crying *Buz*, he could take away a Man's Life, (tho' in truth he could do no ſuch thing) yet this were a juſt Law made, that whoſoever ſhould turn his Hat thrice, and cry *Buz*, with an intention to take away a Man's Life, ſhall be put to death. *Selden.*

Note, To ſay of one *Thou art a Witch*, is not Actionable, becauſe he may bewitch you with his fair Countenance, or fine Diſcourſe. (2 *Cro.* 150. and 306. *contra*, becauſe it brings him within danger of the Stat. 1 *Jac.* which makes every witchcraft Felony) but to ſay *Thou art a Witch, and deſerveſt to be hanged*, will bear Action, becauſe the laſt Words explain what manner of Witch he intends. So to ſay *Thou*

art

art a Witch, and haſt bewitched my Mother's Milk, Drink, Hogs, &c. So it ſeems of Children: But to ſay——*and haſt bewitched* I. S. *Quære*, becauſe *I. S.* may be captivated with the amiableneſs of the Plaintiff's Perſon: So Note, the difference between ſaying he has bewitched a thing which has ſenſe, and a thing which has not. 1 *Siderfin* 52. 53.

Treſpaſſor ab initio.

A MAN comes into a Tavern, and will needs ſtay up all Night; the Vintner is not bound in ſuch Caſe to watch with him, nor attend upon him all the Night; and therefore if he prays him to be gone, and he will not, but remains there all Night, he is a Treſpaſſor *ab initio.* 11 *H.* IV. 75. *b.*

Note, He that miſuſes an Authority which the Law gives him, as in that Caſe, (ſo if one diſtrein for Rent, and kill the Diſtreſs) ſhall be a Wrong-doer *ab initio*: Otherwiſe if he abuſe an Authority that another gives him; as if I lend my Horſe to *I. S* to ride to *York*, and he ride farther, yet the riding to *York* ſhall not be unlawful. *Vid. Co.* 8. 146. *Perk. fo.* 39. 40. 2 *Roll.* 561, &c. in Abridgement.

Quære, if a Diſtreſs be taken for a Rent-charge, and is miſuſed, whether the Deſtrainor

ſtrainor ſhall be a Treſpaſſor *ab initio*, becauſe the Authority to diſtrain comes from the Party.

Juſtice Hutton's *Caſe.*

Mr. Juſtice *Hutton* having argued in the *Exchequer Chamber* in a Caſe adjourned thither upon a *Scire facias* by the King againſt *Hampden* for Ship-money, wherein he was of opinion, That as well for the Matter as Form upon divers exceptions to the pleading Judgment ſhould be given againſt the King: After this, one *Thomas Harriſon*, Batchelor of Divinity, came to the Court of *Common Pleas*, (*Hutton* and *Crawley* being then upon the Bench) and ſaid, *I accuſe Mr. Juſtice* Hutton *of High Treaſon*; for which he was committed to the *Fleet* by Juſtice *Crawley*, and after by the King's direction indited in *B. R.* and Convicted, and Fined 5000 *l.* to the King: And the Judge preferring his Bill againſt him there, recovered 10000 *l.* damages. *Hut. Rep.* 131. *Cro. Car.* 503.

Trades.

In the time of *H.* IV. when Sir *William Gaſcoine* was Lord Chief Juſtice, a certain Vintner was indicted for ſelling of Wine,

Wine, and alſo for ſelling of Victuals to ſuch as would reſort to Dine and Sup at his Houſe, and being thereof Convicted, he was Fined; whereupon he conſulted with ſome of his Fraternity, and told 'em, *If they would give five Pounds to* Gaſcoine, *all would be well*; and ſo they collected 5 *l.* between 'em to preſent him, which *Gaſcoine* underſtanding, he cauſed the Vintner to be Indicted for this alſo, who was after Fined for it, *Palmer* 396. 397.

Note, A Man could not by the Common Law uſe as many and what Trades he would before the Stat. 5. *Eliz.*

Memorandum, *John Walter* Knight, Lord Chief Baron, a profound learned Man, and of great Integrity and Courage, being Lord Chief Baron by Patent, *primo* Caroli, *quamdiù ſe benè geſſerit*, fell into the King's diſpleaſure, and being commanded to forbear the exerciſing of his Judicial place in Court, never did exerciſe it from the beginning of *Mich.* Term *quinto Caroli* untill he died, *viz.* the Eighteenth of *November*, 1630. But becauſe he had that Office *quam diù ſe benè geſſerit*, he would not leave his place, nor ſurrender his Patent without a *ſcire facias* to ſhew what Cauſe there was to determine, or forfeit it, ſo that he continued Chief Baron until the Day of his Death. *Cro. Car.* 203.

One

One Indicted for behaving himself immodestly and Irreverently at Church.

A CERTIORARI was prayed to remove an Indictment at the Sessions at *Hartford* against *I. S. quod non reverenter & modeste se gessit* during Divine Service, but the Court refused to grant it; for altho' it is punishable by Ecclesiastick censures, yet they conceived it a proper cause within the cognizance of the Justices of Peace. 1 *Keb.* 491.

Slander.

ACTION upon the Case for Words against a Feme (on a question asked her *per quendam ignotum*) *Did* I. S. *the Plaintiff Ravish you?* She answered *Yes. Had he the use of your Body?* She answered *Yes.* Whereupon he brought his Action against Baron and Feme. *Foster* conceived, that in regard the Person is found to have done it *falso & malitiose*, without legal authority, 'tis a Scandal; *contrà* by *Twisden* in one *Emme's* Case; one that had a Child at Nurse came to a Surgeon, with whom she was reported to be in cure for the Pox, who on enquiry told the Father *she had the foul Disease*, which was held no Scandal, not

not being ſpoken *malitiosè*, with intent to Scandal her. 1 *Keble* 542. *Hoſt* and *Oakeman*.

[*Thou art a Thief, and haſt ſtollen my Maiden Head*] no Action lies. 1 *Brownlow* 2.

Juſta occaſio Loquendi.

In *Fox*'s Book of Martyrs, there is a ſtory of one *Greenwood*, who lived in *Suffolk*, that he had perjured himſelf before the Biſhop of *Norwich*, in teſtifying againſt a Martyr that was burnt in Queen *Mary*'s time, and had therefore afterwards, by the juſt Judgment of God, his Bowels rotted in him, and ſo died: But it ſeems this ſtory was utterly falſe of *Greenwood*, who after the Printing of the Book of Martyrs, was living in the ſame Pariſh: It happened after that one *Prick*, a Parſon, was preſented to the Living of that Pariſh where this *Greenwood* dwelt; and ſome time after in one of his Sermons, happened to inveigh much againſt the Sin of Perjury, to which his Text led him, and the better to deterr the People from it, he told them this paſſage out of *Fox*, That one *Greenwood*, being a Perjured Perſon, and a great Perſecutor, had great Plagues inflicted upon him, and was killed by the Hand of God; whereas in truth he never

was ſo Plagued, and was himſelf preſent at that Sermon, and thereupon brought his Action upon the Caſe for calling him *a Perjured Perſon*; and the Defendant pleaded, *Not Guilty*: And this matter being diſcloſed upon the Evidence, *Wray* Chief Juſtice delivered the Law to the Jury, That this being delivered but as a Story, and not with any Malice or Intention to ſlander any, he was not guilty of the Words maliciouſly, and ſo was found *Not Guilty*.

This Caſe is cited by *Coke*, 2 *Cro.* 91. and affirmed to be good Law by *Popham*, when one delivers ought after his occaſion, as matter of Story, and not with intent to Slander any; See the Caſe, 1 *Roll.* 87.

'Tis cited too by Sir *Robert Atkins* in his Treatiſe of the Jurisdiction and Privelege of Parliament, *&c. fol.* 11. *If a Man* (ſays he) *be in diſcharge of his Function, and lawful Calling, and diſcourſing of a ſubject proper for it, in purſuit thereof tells a Story, which he takes up upon Truſt, not knowing it to be falſe, and it prove at laſt to be utterly untrue, and an innocent Perſon is highly Slandered by it, yet he ſhall not be ſubject to an Action of Slander for it, the occaſion of ſpeaking ſhall clear him from the Malice, without which the Action will not lie.*

One

One calling himself by a wrong Name is arrested, the Arrest is naught.

In an Action of *False Imprisonment* by *Coot* against *Lighworth*, the Defendant justified, because he had a Warrant to Arrest *I. D.* and he demanded of *Coot* what his Name was? who answered, that his Name was *I. D.* and therefore he arrested him; to which the Plaintiff demurred, and had Judgment; for the Defendant at his peril, must take notice of the Party. *Moor fol.* 457. Agreeable hereunto, see *Doctor* and *Stud*, 311. That if a Sheriff upon a Replevin deliver other Beasts than were destrained, tho' by information of the Party that destrained, yet Trespas lies, for he shall be compelled by the Law to execute the King's Writ at his peril, according to the Tenor thereof, and to see that the Act which he doth be lawfully done.

Note, *Grome*'s Case in *Palmer*'s *Rep.* 395. *I. S.* knowing that Execution would be made upon his Goods, procured *I. D.* by Covin to bring his Cart into his Yard, to the intent that the Baily might take it in Execution, and so to have Trespas against him, the Bailiff did take the Cart, but afterwards having knowledge of the matter, sent the Cart back, and *I. D.*

brought Treſpaſs, but *Lea* Chief Juſtice held, that the Bayliff might plead the fraud in excuſe.

Bond in a Book, good.

A MAN writes an Obligation in a Book, and in the ſame Leaf he puts his Seal to it, and then delivers the Book to the Obligee as his Deed; this is a good Obligation, for he delivered that which makes the Obligation and more, as his Deed; and altho' the Delivery be void for the Surplus, yet it's good for the reſidue. *Cro. Eliz.* 613. *Fox* and *Wright*'s Caſe; cited alſo 2 *Roll.* 25.

Action upon the Caſe for inſerting his Name in Letters of Excommunication.

ONE *Harris* was Excommunicated by Sentence, and the Letters of Excommunication delivered to the Parſon of the Pariſh, to be read and publiſhed in the Church: But the Parſon having malice againſt one *Kenton*, razed out the Name of *Harris*, and put in *Kenton*, and pronounced him Excommunicate; whereupon *Kenton* brought an Action upon the Caſe againſt the Parſon, and adjudged maintainable, for altho' the Excommunication be Spiri-

Spiritual, and the denouncing thereof; yet the Raſure and Alteration is meerly temporal, for which an Action well lies at the Common Law, and this was not only an injurious Vexation, but alſo Scandalous to *Kenton*. *Cro. Eliz.* 838. *Kenton* and *Wallinger*, and 1 *Roll.* 100.

Prince Henry *committed to the King's-Bench.*

HENRY the Fifth, whilſt he was Prince, did many things very incongruous to the greatneſs of his birth; for he and his wild Companions would often way-lay, and rob his Father's, and his own Receivers; and when one of his Servants was arraigned at the King's Bench Barr for Felony; this Prince hearing of it, poſted thither, and commanded his Fetters to be ſtruck off, and he to be ſet at Liberty: When *William Gaſcoigne* Lord Chief Juſtice oppoſed him therein, and commanded him upon his Allegiance to ceaſe from ſuch Riot, and keep the King's Peace; the Prince in a Rage aſcended the Bench, and gave the Judge a Blow on the Face, who ſate ſtill undaunted, and boldly thus ſpake unto him: *Sir, I pray remember your ſelf, this Seat which I here poſſeſs is not mine, but your Father's, to whom, and to his Laws,*

you owe double Obedience; if his Highneſs and his Laws be thus violated by you who ſhould ſhew your ſelf obedient to both, who will obey you when you are a Sovereign, or Miniſter Execution to the Laws that you ſhall make? Wherefore for this default, in your Father's Name, I commit you Priſoner to the King's-Bench, until his Majeſties pleaſure be farther known: With theſe Words, the Prince abaſhed, ſtood mute, laid by his Weapons, and with obeyſance done, went to the Priſon. *Medull. Hiſt. Angl. in vita* H. V. 3 *Inſt.* 225.

He proved afterwards one of our greateſt Kings, being (as I find him Characterred) a Prince Godly in Heart, Sober in Speech, Sparing of Words, Reſolute in Deeds, Provident in Counſel, Prudent in Judgment, Modeſt in Countenance, Magnanimous in Action, Conſtant in Undertaking, a great Alms giver, Devout to God-ward, a Renowned Soldier, Fortunate in Field, from whence he never returned without Victory.

Queen.

THE King cannot grant to another for Life the Office of making Saddles for the Queen, for the Queen is a Feme ſole, and

and ſo may chooſe her own Officers. *Dubitatur* P. 6. *Jac. C. B.* between *Auburcurmil* and *Cure.* 2 *Roll.* 213. *n.* 12.

The Violating of a Queen Dowager, no Treaſon.

THE Stat. of 25 *E.* 3. ſays, *Si homme violaſt la Compaigne le Roy,* &c. which ſignifies the King's Wife or Conſort, for it is no Treaſon to violate her unleſs it be done during the Marriage with the King, and therefore extends not to a Queen Dowager, who after the King's death is not *ſa Compaigne.* 3 *Inſt.* 8. 9.

Action upon the Caſe for throwing Wine upon his Velvet Doublet.

ONE *Carey* brought an Action of Treſpaſs, *quare vi & armis,* againſt *Stevens* for caſting Wine upon his Velvet Doublet, and well brought, tho' he might have had an Action upon the Caſe. *Noy* 48.

Where one may juſtifie the detaining of a thing 'till Satisfaction made.

IF a Taylor has a Sute to make for me, he is not compellable to deliver it, untill he is paid for the making, yet he cannot

ſell it for default of payment, as an Innkeeper may an Horſe where there is no ſpecial agreement; for the keeping of the Horſe is a charge, becauſe he eats, but the keeping of Apparel is no charge. *Yelverton* 67.

Note, If I contract with a Taylor to give him ſo much for making, *&c.* he cannot detain the Cloths till he is ſatisfied, *&c.* (becauſe he may ſue me upon the Contract) *per Williams.* 2 *Roll.* 92. *initio.*

See *Popham's Rep.* 127. *Robinſon* and *Walter*, that an Inn-keeper may detain the Horſe of *I. S.* till he be ſatisfied for the Meat he has eaten, tho' he were brought to him by a Stranger.

A Wife entices another Man to marry Her.

Cooper brought an Action upon the Caſe againſt *Witham* and his Wife, for that the Wife maliciouſly intending to marry him, did often affirm that ſhe was ſole and unmarried, and importuned *& ſtrenuè requiſiwit* the Plaintiff to Marry her, to which affirmation he giving Credit, married her, where *in facto* ſhe was Wife to the Defendant, ſo that the Plaintiff was much troubled in mind, and put to great Charges, and much damnified in his Reputation: He had a Verdict but no Judgment, for by

by *Twiſden* the Action lies not, becauſe the Thing here done is Felony: No more than if a Servant be killed, the Maſter cannot have an Action *per quod Servitium amiſit, quod Curia conceſſit*; beſides the ground of this Action is the Communication and Contract of the Wife, which ſhall not bind the Husband. 1 *Siderf.* 375.

Whether Treſpaſs lies for Husband or Maſter for a Battery whereof his Wife or Servant dies?

If one beat my Servant, whereby I loſe his Service for a long time, and he afterwards dies, I ſhall have an Action of Treſpaſs, becauſe it was a diſtinct Treſpaſs to me, by *William*'s Juſtice: But if one beat my Wife, whereby ſhe languiſhes, *&c.* and after dies, I ſhall not have Treſpaſs for this Battery, becauſe the Treſpaſs was not done to me, but to my Wife, ſo that ſhe was to have joyned in the Action, and I only for conformity. 2 *Roll.* 568. *Huggin*'s Caſe.

Note, that Caſe is reported by *Yelverton*, 89. 90. and warrants not the diverſity taken; for 'tis holden there by Three Judges (no mention of Juſtice *Williams*) that the Maſter ſhall not have an Action for ſuch Battery and loſs of Service;

Service; but that here as well as in the other Case, the Servant dying with the extremity of the Battery, it is now become an Offence to the Crown, being turned into Felony, which drowns the particular Offence and private wrong offered to the Master, and so his Action is gone: *Vide* 1 *Siderf.* 375. *Acc'.* and *Stiles* 347. where *Roll.* himself being Chief Justice, cites the Case of *Higgins* to have been adjudged, That Trespass lies not for the Battery of a Wife whereof she died, because (says he) it is Felony; the reason given by the Three Judges why it lies not for the Master. See 1 *Brownl.* 205.

Admiralty.

A MERCHANT hath a Ship taken by a *Spaniard*, being Enemy, and sometime after an *English* Merchant with a Ship named *Little Richard* retakes it from the *Spaniard*, and the owner of the Ship sues for it in the Admiralty Court, but a Prohibition was granted, for that the Ship was gained by Battle of an Enemy, and neither the King, nor Admiral, nor the Parties to whom the Property was before, shall have it. 2 *Brownl.* 11. *Weston's* Case.

Master

Master and Servant.

A SURGEON in consideration of a Summ of Money, assumed to cure the Servant of *I. S.* of a hurt which he had in his Leg, and afterwards applied unwholsome Medicines to it, on purpose to make the cure the greater, whereby *I S.* lost the Service of his Servant for a long time, wherefore he brought an Action upon the Case against the Surgeon, and recovered. 1 *Roll.* 98. *Everard* and *Hopkins.*

If a Drawer in a Tavern sell Wine that is corrupt, an Action upon the Case lies for this against the Master, tho' he did not command his Servant to sell it to any Person in particular: And no Action lies against the Drawer, tho' he knew the Wine to be corrupt, because he sells it only as Servant to another. 1 *Roll.* 95.

Vide Dr. and *Stud.* 285. that if one send his Servant to Market with a thing which he knows is defective, to be sold to a certain Person, and the Servant sells it to him, an Action lies against the Master: But if he send it to be sold generally to whom he can, no Action of Deceit lies against the Master. 1 *Roll.* 95. *Accord'.*

If

If my Servant be cozened of my Money, I may have an Action upon the Case for the deceit againſt the Cozener. 1 *Roll.* 98. *Paul Tracie's* Caſe.

So I may juſtifie the beating of another in defence of my Servant, for he is in a manner my Chattel. 2 *Roll.* 546. the end. (The contrary admitted, *Palmer* 54.) See *Owen* 150.

A Servant ſhall juſtifie the Battery of another in defence of his Maſter. 2 *Roll.* 546. *Quære* 14 *H.* VI. 24. *b.*

Note, Tho' in the Caſe of Felony, if the Principal die, or be pardoned before Attainder, the Proceedings againſt the Acceſſary fail (*Co.* 4. 43. *b.*) yet in a Treſpaſs, if one command his Man to beat you, and the Servant after he has beaten you, dies, yet your Action of Treſpaſs ſtands good againſt the Maſter. 17 *H.* IV. 19 *Bac. Elem.* 32.

I. S. ſuffered a Soldier to get a Child upon the Body of his Maid-Servant, and the Order of Seſſions was, that *I. S.* ſhould contribute to half the charge of keeping it. *Curia.* 'Tis not within the Stat. of 18 *Eliz.* and the Order was quaſhed.

Poſſeſſion,

Poſſeſſion, how to be Defended.

IN Treſpaſs of Aſſault and Battery, the Defendant pleaded *De ſon Aſſault demeſne*; the Plaintiff replied, the Defendant would have forced his Horſe from him, wherefore he did *Molliter inſultum facere* upon the Defendant in defence of his Poſſeſſion: to which the Defendant demurred. *Morton* Juſtice: *Molliter inſultum facere* is a contradiction; ſuppoſe you had ſaid, that *Molliter* you knocked him down? *Twiſden:* you cannot juſtifie the beating a Man in defence of your Poſſeſſion, but you may ſay that you did *molliter manus imponere*, &c. *Keeling*, You ought to have replied, that you did *Molliter manus imponere, quæ eſt eadem tranſgreſſio. Curia: Quer' nil cap. per bill. Mod. Rep.* 36. and 1 *Siderf.* 441. *Jones* and *Treſilian.*

Slander of a Counſellor at Law.

PETER *Palmer* of *Lincoln*'s-Inn brought an Action upon the Caſe againſt *Boyer*, and declared that he was an Utter-Barreſter of the Law, and got his living by practiſing the Law, and was Steward of divers Courts, and namely of one *I. P.* Eſq; and the Defendant *præmiſſorum non ignarus*,

narus, to the intent to prèjudice the Plaintiff in his good Name and Practice, ſaid of the Plaintiff theſe *Engliſh* Words, *viz.* Peter Palmer *is a paltry Lawyer, and hath as much Law as a Jackanapes*; 'twas moved in arreſt that the Words would not maintain an Action; becauſe not ſlanderous, for 'tis not ſaid, He hath no more Law than hath a *Jackanapes*, that had been Actionable, for thereby he had abated the Opinion of his Learning; but it is not ſo in this Caſe, the Words being, *he hath as much Law as hath a Jackanapes*, which is no impeachment of his Learning, for every Man that hath more Law than a *Jackanapes*, hath as much: *Sed non allocatur*, for the Compariſon is to be taken in the worſt Sence, and tantamounts that he hath no more Law than a Jackanapes, which is a ſlander in his Profeſſion, whereby he acquires his Living. *Owen* 17. *Cro. Eliz.* 342. *Goldsb.* 126. *Winch* 40.

Vide March fol. 60. where Judge *Berkley* ſaies, it had been adjudged, where one ſaid of a Lawyer, That he had as much Law as a *Monkey*, that the Words were not Actionable, becauſe he hath as much Law, and more alſo; but if he had ſaid, *He hath no more Law than a Monkey*, theſe Words were Actionable. See *Hetley* 71.

Words

Words againſt an Attorney.

ACTION for theſe Words; *Is* Martyn (the Plaintiff) *your Attorney? He is the Fooliſheſt and Simpleſt Attorney towards the Law, and if he doth not overthrow your Cauſe, I will give you my Ears. He is a Fooll and an Aſs*; and adjudged for the Plaintiff, for theſe Words touch him in his Place. *Cro. Eliz.* 589.

Slander againſt a Parſon.

SUIT in the Spiritual Court by a Parſon for ſaying of him, *That he was a Fool, an Aſs, and a Gooſe*, for which, upon Motion, a Prohibition was granted, for they are only Words of Choler, as *Pocky Faced Knave, Jade, and Queen*, and relate not to his Profeſſion. 3 *Keb.* 28. *Newcombin* and *Kingerby*.

Where Things ſhall not paſs, tho' granted by expreſs Words.

A MAN by Deed indented, bargains and ſells, gives and grants his Mannor of *Dale*, and *all his Trees growing upon it*; but the Deed is not enrolled according to the Statute; here, inaſmuch as the Mannor paſſes

paſſes not for want of Inrolment, the Trees ſhall not go to the Bargainee, altho' they are granted by expreſs Words; and that the Grant of every Man ſhall be taken moſt ſtrongly againſt himſelf; for the Law does not favour Fractions and Severances of Trees from the Freehold and Inheritance of the Land, becauſe by ſuch means very often Trees ſhall be waſted and deſtroyed. *Co.* 11. 48. *a.* in *Liford's* Caſe. 1 *Roll. Rep.* 100.

Beſides, it was not the intent of the Parties that the Trees ſhould paſs as Chattels without the Mannor, and as one ſhall not fruſtrate or defeat his own Grant by his own Act; ſo the Words of a Grant ſhall be conſtrued according to a reaſonable and eaſie Sence, with regard to the meaning of the Parties by them; and therefore 14 *H.* VIII. 1. if a Man grant all his Woods and Trees, Apple-Trees will not paſs.

Note, that tho' by a grant of all my Trees, Fruit-Trees will not paſs, yet if I except all my *Apple-Trees*, all other Fruit-Trees paſs, as I ſuppoſe. *Vide Hob.* 304.

Again, The Law conſtrues things with equity and moderation, and therefore reſtrains a general Grant, if there be any miſchief or inconvenience in it, and therefore if a Corody be granted to one, and his

his Servant to ſit at his Meſs, he cannot bring a Servant that hath ſome filthy or noiſome Diſeaſe: So if a Common be granted to one for all his Beaſts, yet he ſhall not have Common for Goats, nor Geeſe, nor other Beaſts not commonable. *Finch* his Law 56.

So if a Man grant Common in all his Lands, the Grantee ſhall not have Common in his Orchards, Gardens or Meadows. 3 *Leon.* 250.

Where one may have an Eſtate Tail, yet all the Iſſues barred to inherit.

BARON and Feme Tenants in ſpecial Tail, with Remainder to the Barons right Heirs, they have Iſſue *A.* the Baron dies, *A.* in the Life of his Mother levies a Fine with Proclamations to *I. S.* and reſolved it ſhould barr the Eſtate Tail, tho' 'twas clearly admitted that the Feme remained Tenant in Tail. *Co.* 3. 50.

If the Son of Tenant in Tail levy ſuch a Fine in his Fathers Life, it barrs the Tail from deſcending, yet the Father remains Tenant in Tail. *Co.* 9. 141. for the Son is concluded, and cannot enter againſt his own Fine. See Stat. 32. *H.* VIII.

Name.

DEBT upon Bond was brought againſt one *Jaacob Aboab*, by the Name of *Jacob*, he pleaded that he was called and known by the Name of *Jaacob*, and not *Jacob*; but it was over-ruled. *Mod. Rep.* 107. 3 *Keb.* 284.

See a notable Caſe in *Stiles Rep.* 389. 390, *&c.* the Report of it is very long, but this is the ſhort on't. One [*Mills*] ſeiſed of Lands in Fee, deviſed them to *Elizabeth* his Daughter in Tail, with a proviſoe that if ſhe Married one of his own Sirname, that then ſhe ſhould have the Lands in Fee-Simple: She Married one [*Mill*] but commonly called and known by the Name of [*Mills*] alſo: In this Caſe the Court held that *Mills* and *Mill* are not one and the ſame Sirname, for the Teſtator had a particular Eye to his own true Sirname, and the common reputation of *Mill* and *Mills* to be the ſame Name, ſhall not make *Mill* to be the Teſtator's true Sirname. Note, This is a ſpecial Caſe, and goes not according to the ordinary Rules of Names that ſound alike.

Hence I ſhall take occaſion to treat of Names, what Names are the ſame in Law, and what are not.

It

It is held that *Sain John* and *Saint John* are ſeveral Names: So are *Elizabeth* and *Iſabel*; ſo *Margaret*, *Marget*, and *Margerie*; ſo *Gillian* and *Julian*; ſo *Agneis* and *Anne*; ſo *Cozen* and *Couſin*; ſo *Edmund* and *Edward*; ſo *Randulphus* and *Randal*; and ſo *Randulphus* and *Randolphus*; ſo *Randolph* and *Ranulph*; ſo *Iſabel* and *Sibil*; for all which ſee 1 *Anderſon* 211. 212. 2 *Cro.* 425. 558. 640. 2 *Roll.* 135.

But *Piers* and *Peter* are one Name, 2 *Cro.* 425. ſo *Saunders* and *Alexander*; ſo *Garret*, *Gerrard*, and *Gerald.* 2 *Roll.* 135. ſo *Joan* and *Jane.* 2 *Cro.* 425.

Note, Tho' *James* and *Jacob* are ſeveral Names, yet *Jacobus* is Latin for both, and will ſerve for either of 'em. 2 *Roll.* 136.

Sir *John Hathwaie* was bound in a Bond thus, *Noverint Univerſi me* Jean. Hathwaie *teneri*, &c. this was a good Obligation, for [*Jean.*] ſhall be taken for an abbreviation of *Johannem*, and ſo the ſame Name. *Cro. Car.* 416. 418. 2 *Roll.* 136.

Note, If the Name of the Obligor be ſubſcribed, it is ſufficient, tho' there be a blank or blot for his Chriſtian Name in the Bond. 2 *Cro.* 261. *Dobſon* and *Key's*. See more of Names, 1 *Keb.* 427.

What one cannot do by another.

THERE are ſome things perſonal, and ſo inſeparably annexed to a Man's Perſon, that he cannot do them by another, as the doing of Homage and Fealty. So it is holden that a Lord may beat his Villain for cauſe or without cauſe, and the Villain is without remedy; but if the Lord command another to beat him without cauſe, who does accordingly, the Villain ſhall have an Action of Battery againſt him. So if the Lord deſtrain his Tenant's Cattle, when nothing is behind, yet the Tenant for the Reverence and Duty that appertains to the Lord, ſhall not have Treſpaſs *vi & armis* againſt him; but if the Lord command his Bailiff or Servant to deſtrain in ſuch caſe where nothing is behind, the Tenant ſhall have an Action of Treſpaſs *vi & armis* againſt them. *Co.* 9. 76. *a.* in *Comb's* Caſe.

Where a Commoner ſhall have an Action upon the Caſe againſt the Lord.

If the Lord ſurcharge the Soil with Conies, the Commoner upon this particular loſs may have an Action upon the Caſe againſt

againſt him. *Yelverton* 104. 105. See *Cro. Car.* 387. 388.

Words ending in Ment.

JUSTICE *Doderidge* ſaies, It has been wittily obſerved, that all Words which end in *Ment*, ſhall be taken and expounded according to the Intent, as *Parliament*, *Teſtament*, *Arbitrament*, &c. *Latch* 41. 42.

Where one ſhall be remitted againſt his own Diſcontinuance and Repriſal.

BARON and Feme Tenants in ſpecial Tail; He aliens in Fee, and takes back an Eſtate to them for their Lives, this is a Remitter to both, maugre the Husband, for it cannot be ſo to the Wife, without alſo to him, becauſe they are but one Perſon in Law, tho' he be eſtopped to claim, and ſo it is a remitter in him againſt his own alienation and repriſal. *Lit. Sect.* 672.

Note, if he had taken the Eſtate to him alone, he could not have been remitted againſt his own alienation; but when the Eſtate is made to Husband and Wife, tho' they are but one Perſon in Law, and no Moieties between 'em, yet becauſe ſhe can't be

remitted unleſs he be remitted alſo, and becauſe remitters are favoured in Law, the more ancient and better rights being thereby reſtored, therefore in Judgment of Law both are remitted, *quod nota.* 1 *Inſt.* 354.

Where a Wife may convert Goods to her own uſe.

THE common Doctrine is, That a Wife cannot convert Goods to her own uſe, becauſe ſhe has no property during the Husband's Life; yet note, In ſome Caſe there may be a Converſion of Goods by the Wife to her own uſe, as if ſhe find, or take Barley from another (as the Caſe was) and bake it into Bread, and eat it herſelf. *March fol.* 60. and *Jones* 443. *per Jones* Juſtice.

Note, When the Baron and Feme joyn, it is the Act of the Baron only, and the Feme in ſuch Caſe cannot convert to her own uſe, But an Action of Trover well lies for converſion by the Feme before Marriage, or by the Feme only during the Coverture, for ſhe may do a Tort ſolely, and the Husband ſhall be ſued with her, but not where ſhe joyns with the Husband. *Cro. Car.* 254. *Rhemes* and *Humphreys*, and *fol.* 494. *Perry* and *Diggs*, *acc'*. See 2 *Cro.* 5.

Where

Where a Wife may give Evidence againſt her Husband.

THE Lord *Coke* in his 1 *Inſt. fo.* 6. *b.* ſays, It has been reſolved that a Wife cannot be produced either for or againſt her Husband, *quia ſunt duæ animæ in carne unâ*, and it might be a cauſe of implacable Diſcord between them, and a mean of great inconvenience: Yet it was reſolved in the Lord *Audley*'s Caſe, *Hut. Rep.* 116. that altho' in the Caſe of a Common Perſon between Party and Party, the Wife cannot be produced as a Witneſs againſt her Husband, yet between the King and the Party upon Indictment ſhe may, altho' it concerns the Feme herſelf; as in that Caſe the Lady *Audley* gave Evidence againſt my Lord, who was acceſſary to her Rape, and was thereof found guilty.

Husband ſwears for his Wife's Debt.

DEBT againſt Baron and Feme for certain Barrels of Beer ſold to her *dum ſola*, &c. they both waged their Law, and did both ſwear according to the form of the Oath, *quod nota*, That the Husband ſwore for his Wife's Debt. *Cro. Eliz.* 161. *Weeks* and *Holms*. See 1 *Inſt.* 172. *b. acc*.

that the Husband and Wife of full age, ſhall make their Law for the Debt of the Wife before the Coverture.

Whether a Wife ſhall be examined upon a common Recovery.

SEE 1 *Siderf.* 322. in Fine, where the Reporter ſaies, *Quære*, How a Wife can be barred, unleſs by Fine, becauſe ſhe is not examined upon a common Recovery: Yet *vide* the ſame *Rep. fol.* 11. that ſhe ſhall be privately examined when ſhe ſuffers a Common Recovery, as well as where ſhe levies a Fine, by *Bridgman* Chief Juſtice, (tho' ſhe was there permitted to do it without ſuch examination) And 1 *Roll.* 347 is, That if Baron and Feme ſuffer a Recovery, it ſhall bind her, becauſe ſhe is examined in it: And *Co.* 11. 77. *a.* if a Feme Covert make any Conveyance, unleſs by Fine or Recovery, it is avoidable, yet *fol.* 78. *a.* it is ſaid, That the Perſon of a Feme Covert is diſſabled to convey her Land unleſs by Fine upon due examination. *Vide Stiles* 320. by *Roll.* Chief Juſtice. It is not to be queſtioned whether a Recovery bind a Feme, for it is the common Practiſe, and 'tis not neceſſary to examine her, tho' it be a prudential thing to

to do it; but if it be not done, it is not averrable that it was not done.

Man and Wife but one.

A WRIT of Conſpiracy for endicting one of Felony does not lie but againſt two Perſons at the leaſt, therefore you ſhall not have ſuch a Writ againſt Husband and Wife, becauſe they are but one Perſon. (and one only cannot be ſaid to conſpire with himſelf) *F. N. B.* 116. *K.*

Payment.

IN Debt, the Condition was to pay 100 *l.* to *I. S.* and his Wife: *per Curiam*, if the Defendant plead payment to *I. S.* alone, it is good, for payment to him ſuffices, without naming the Wife. *Goldsb.* 73, *May* and *Johnſon.*

Note, If one is obliged to pay Money to two actually, he can pay it only to one of 'em, for he cannot pay the ſame ſumm to two ſeveral Perſons at one and the ſame time. 2 *Siderf.* 41.

Priviledges

Priviledge.

If the Wife of an Attorney of the *King's-Bench* be arreſted, ſhe ought not to claim the Priviledge of that Court, not to put in bail to the Action, as her Husband may; but he muſt put in bail for her, and for want thereof ſhe ſhall go to Priſon. *Stiles Pract. Reg.* 446.

Slander of a Juſtice of Peace.

One ſaid of a Juſtice of Peace, *He is a Logger-headed, and a Slouch-headed, Burſen-bellied Hound*; this is no cauſe of Indictment before Juſtices of Peace in their Seſſions, partly for want of Juriſdiction, and partly becauſe the Words are not Actionable. This was aſſigned for Error after Judgment. *Adjornatur.* 1 *Keb.* 629.

Pictures and Hangings.

A Picture nailed through the Frame to the Wall is fixed to the Freehold, and cannot be removed, by *Twiſden*: But note, ſuch things as uſe not ordinarily to be ſo fixed, tho' they are nailed yet may be removed, as Hangings, *&c.* Contrary of a painted

painted Cloth nailed round, by *Hales* and *Rainsford.* 3 *Keb.* 74.

Simony without the Privity of the Incumbent or Patron.

THE Father of the Incumbent contracted with the Patron's Wife to give her 100 *l.* if the Patron would preſent his Son, the Patron and Incumbent not knowing of this Contract, as it was found by ſpecial Verdict, yet held within the purview of the Stat. 31 *Eliz.* So note, Simony may be by compact betwixt Strangers without the Privity of the Incumbent or Patron. Cited *Cro. Car.* 331. to have been adjudged in *Calver's* Caſe.

An Incumbent being ſick, the Father contracted for the next Avoidance for 100 *l.* in the preſence of his Son, and after the Incumbent died, the Father preſented his Son, who was Inducted, and agreed clearly to be Simony: but all the Judges (except *Anderſon*) held, That if the Son had not been privy to the bargain, it had not been Simony; yet they agreed, If a Stranger buy the next Avoidance, and preſent one that is not privy 'till afterwards, and after is made privy, and then preſented, that this is Simony: Not ſo where the Father buys, becauſe bound in nature to provide

provide for his Son; & of the difference. *Moor* 516. *Smith* and *Sherborn*'s Case. *Vid. Noy* 22. *Hob.* 165.

Extinguiſhment.

LESSEE for Ten Years grants a Rent-charge to his Leſſor for the ſaid Years, the Leſſor grants the Remainder to the Leſſee for Years: The Court held that the Rent was gone, becauſe the Leſſor who had it was Party to the deſtruction of the Leaſe, which is the ground of the Rent. 4 *Leon.* 2. *Buckhurſt*'s Caſe.

Leaſe.

A MAN made a Leaſe for Years by Indenture, reſerving a Rent, and in the Counterpart of the Leſſor 27 *l.* was reſerved, in the Counterpart of the Leſſee but 26 *l.* afterward a Controverſie aroſe between them what Rent ſhould be paid, the Leſſor would have 27 *l.* the Leſſee would pay but 26 *l.* but after was content to pay 27 *l.* and ſo agreed with the Leſſor, and drew a Stroke in his Indenture, and made it 27 *l.* this made his Leaſe void. 1 *Roll.* 29. *Facman*'s Caſe.

Simony,

Simony, tho' no Admiſſion nor Inſtitution.

ONE was Simonaically promoted to a Benefice, but this was *Anno* 1659 when there were no Biſhops, and ſo there was no Admiſſion nor Inſtitution, and therefore moved he could not be guilty of Simony within the Statute: This was offered to be found ſpecially, but diſſallowed by the Court, for by this Argument none could be guilty of Simony in the late times, becauſe no Biſhops to admit and inſtitute, which would be inconvenient. 1 *Siderf*, 221. *Snow* and *Phillips*.

Advowſon.

A MAN preſents to his own Church as Proctor to another, by this he loſes his Advowſon. So if Leſſee for Years of an Advowſon be preſented to the Church, 'tis an Extinguiſhment of the Term. *Owen* 142. *Rudd* and *Topſey*'s Caſe.

Property changed by Offerings.

IN the time of Popery here, if a Stranger had taken my Goods, and offered them to an Image in a conſecrated Church, this had made as good a change of the property

perty of my Goods, as if I had ſold them in a Market overt; but if I found the Goods after in the Wrong-doers poſſeſſion, I might take them again. 34 *H.* VI. 10. *Co.* 10. 91. *a. Degg* 147.

Property in Negroes.

In the Caſe of *Butts* and *Penny*, 3 *Keb.* 785. it was reſolved by the Court that *Negroes* are by Uſage *tanquam bona*, and ſhall go to Adminiſtrator until they become Chriſtians, and thereby they are infranchiſed: This was upon a ſpecial Verdict in an Action of *Trover*, the Jury finding that Negroes are uſually bought and ſold in *India*.

So Trover lies for *Monkeys*, becauſe they are Merchandiſe, and valuable, (without ſhewing they are tame or reclaimed.) 2 *Cro.* 262.

Libel for Knave.

Libel for calling one Knave, Prohibition lies, becauſe in the time of *H.* VI. Knave was a good Addition. *Week*'s Caſe. *Trin* 12 *Jac. B. R. Latch* 156. 1 *Siderf.* 149.

Attorney

Attorney made a Knight.

IF I make *I. S.* my Attorney, and he (the Warrant of Attorney ſtill continuing) is made a Knight, yet the Warrant of Attorney is not determined, tho' the Word Knight, which is now part of his Name, be not in it. By *Brown* Juſtice. *Owen's Rep.* 31.

Creation of a Gentleman.

A GENTLEMAN is by Deſcent, yet (ſays the Lord *Coke*) I read of the Creation of a Gentleman, and thus it was: A *French* Knight came into *England*, and challenged *John Kingſton* Yeoman (a good and a Strong Man at Arms, but no Gentleman) at certain Points and Deeds of Arms, *&c. Unde Rex* (ſaith the Record) *ut dictus* Johannes *honorabilius in præmiſſis accipiatur, ipſum* Johannem *in ordinem Generoſum adoptavit, & Armigerum conſtituit, & cætera honoris Inſignia ei conceſſit.* 2 *Inſtit.* 595. and 668.

Addition.

Addition.

A GENTLEMAN by Reputation that is neither Gentle by Birth, Office, or Creation, but commonly called Gentleman, and known by that Name, is a ſufficient Addition within the Stat. 1 *H.* V. *c.* 5. *Cater*'s Caſe, cited 6 *Rep.* 67. *a.* But if he is named *Yeoman*, he cannot abate the Writ. 2 *Inſt.* 668.

'Twas moved to quaſh an Indictment of Forcible Entry, becauſe the Addition of the Parties was in *Engliſh*, *ſcil.* Weaver, Confectioner, *&c.* but the Court over-ruled it, for many Perſons have been hanged that have had no other Addition in their Indictment: Note, It is the conſtant practice to put them in *Engliſh* in Indictments. 1 *Siderf.* 101. the King againſt *March*, &c.

If a Gentleman by birth be a Mercer, or, *&c.* and be named ſo in an Original, *&c.* he may abate the Writ, for he ought to be named by the degree of a Gentleman, becauſe it is worthier than the Addition of any Myſtery. 2 *Inſt.* 668. 669.

Wife

Wife loſes Money at Play.

Our Law excludes not the Wife from uſing her Husband's Goods in common with him (which is the reaſon that a Wife cannot felonioufly take her Husband's Goods, and tho' ſhe ſo take 'em, and deliver 'em to a Stranger, yet no Felony in the Stranger: And that if a Feme Covert ſay of *I. S. He ſtole my Plate out of my Chamber*; altho' ſhe may not have Plate of her own, yet becauſe in common Speech 'tis well known that the Wife accounts her Husband's Goods her Goods, the Words are Actionable, *Cro. Car.* 52.) yet for all this, ſhe cannot diſpoſe of her Husband's Goods, and therefore 'twas adjudged in *Stephens* his Caſe, that where a Wife played at Cards, and loſt 40 *l.* of her Husband's Money, that the Husband ſhould recover it again in *Trover* againſt the *Gameſter*. 1 *Siderfin* 122. 1 *Keb.* 340.

Quære what Remedy for the *Gameſter* if he loſes to the Wife, or will the Law conſtrue it a Gift of the Money to her, *&c.*

A. *takes* B's *Wife and Cloths her.*

An Adulterer takes away another Man's Wife, and puts her in new Clothes; the Husband may take the Wife with her Clothes, for it is as it were a Gift of the ſaid Apparel unto her: Beſides, the more worthy thing draws to it things of leſs worthineſs, as a baſe *Mine* where there is *Ore*, ſhall be the King's for the worthineſs of the *Ore*. *Finch*'s Law 22, 23. *Vide Cro. Car.* 344.

Woman Indicted for copulating with a Dog.

One *Hicks* was Indicted at the *Old Baily* on the 12th of *July*, 1677. upon Stat. 25 *H.* VIII. *cap.* 6. for Buggery, having ſuffered a Dog to copulate with her, which being fully proved againſt her, and found by the Jury, ſhe was condemned and hanged at *Tyburn* on the 18th of *July* following, and the Dog on a Tree by. 3 *Keb.* 800. The King and *Hicks*.

See *Leviticus* chap. 18. v. 23. *Thou ſhalt not lie with any Beaſt to defile thy ſelf therewith, neither ſhall any Woman ſtand before a Beaſt, to lie down thereto: It is Confuſion.*

Woman

Woman promiſes never to Marry again.

A GENTLEWOMAN took her Husband's Death ſo heavily, that ſhe ſaid, She would never Marry again; but her Son comforted her, ſaying, *God will provide a new Husband*, and ſaid, he would give her 10 *l.* to pay 100 *l.* when ſhe married; ſhe accepted the Money, and within half a Year after Married, whereupon the Son brought an *Aſſumpſit* for the 100 *l.* and this being brought into the Chancery, the Maſter of the Rolls awarded him only 10 *l.* ſaying, he would give never a Penny more, for that it was unreaſonable to barr a Gentlewoman from Marriage. *Owen* 34. *Vide* 2. *Keble* 865.

Bond not to ſell his Wife's Clothes.

A MAN was obliged with condition not to ſell his Wife's Apparel, and held a good Bond, tho' it was moved to be againſt Law, and contrary to the liberty of a Husband ſo to oblige himſelf; but *Coke* held it clearly good, as if one ſhould oblige himſelf to a Stranger to pay to his Wife yearly 20 *l.* this without queſtion is good. 1 *Roll. Rep.* 334. *Smith* and *Watſon's* Caſe.

Deed takes effect from the Delivery, not the Date.

If *A.* covenant that *B.* shall have all his Trees now standing, this refers to the Trees standing at the time of the delivery, and if any be felled after the Date, and before the delivery, he has no remedy for them, by *Flemming.* 2 *Cro.* 264. *Vide Dyer* 139. *a.* and 2 *Roll.* 21.

In an Action of Debt upon a Bond, the Defendant pleaded *Deins* Age; the Case was, That when the Obligation was Sealed and Delivered, the Defendant was of full Age, but at the time when the Bond bore date, he was under Age 'twas ruled that the time of making the Bond was when it was sealed, and not when it bore date. 1 *Brownl.* 30. 31.

Deed enrolled the Day of the Date, yet good.

The Stat. 27 *H.* VIII. *c.* 16. says expressly, That Bargains and Sales to an use of Inheritance of Freehold must be by Deed indented and enrolled within six Months after the date thereof, *&c.* yet it has been held that a Deed may be enrolled the very Day of the date, which the Lord *Hobart* says is by reason of the intent

of

of the Law, and not by the Letter. *Hob.* 139. *Moor* 40. and 42. *acc.* tho' it is there ſaid that ſuch an Enrolment had been adjudged void. See *Latch.* 14.

Tender of 50 *l. in Stone.*

In the Caſe of *Hooks* and *Swain*, 1 *Siderfin* 151. *Twiſden* ſays he remembred this nice Caſe; Sir *William Fiſh* was bound by Obligation to pay (ſuch a Day) in *Gray's-Inn Hall*, fifty Pounds, generally, without ſaying *of Money*; and therefore upon the Day, when the Gentlemen were at Supper, Sir *William* came in, and tendered fifty pound weight of Stone, and adjudged no tender. See *Owen* 64. where *Plowden* ſays, *Libra* in Latin ſignifies a Weight; yet if one is bound in *Viginti Libras*, and forfeits his Bond, he muſt pay Money, and not *Lead*, or the like.

Witneſſes.

One *burned in the Hand for a Felony* may be a Witneſs in a Cauſe, by *Rolls* Chief Juſtice, for he may purchaſe Land, and his fault is purged by his puniſhment. *Style's Rep.* 388. and *Pract. Reg.* 571.

If an Action be brought againſt two, and at the Aſſizes the Plaintiff proceeds

only againſt one of them, the other may be allowed a Witneſs in the Cauſe. *Godb.* Caſe 418.

The Sheriff arreſts a Man looking out of his Window, &c.

WHEN an Execution is lawfully begun, or hath a legal Commencement, the Sheriff may juſtifie the breaking of the Parties Houſe to take him, otherwiſe if there be no legal Commencement: This diverſity was taken and agreed for Law in Sir *William Fiſh* his Caſe; Sir *William* was looking out of his Window, and the Sheriff *per feneſtram* delivered to him *a Capias ad Satisfac.* to take the ſaid *Fiſh*, and apprehend him, and *Fiſh* eſcaped from him, and the Sheriff broke the door of his Houſe *maintenant*, and retook him, and adjudged lawful, becauſe there was a lawful beginning of the Execution before, which was preſently purſued. *Palmer's Rep.* 53.

Vide Hobart fol. 62. That a Sheriff cannot upon private proceſs ruſh into a Houſe which by craft, as knocking at the Door, *&c.* he procured to be opened unto him, and there the firſt entry was held unlawful, for the opening of the Door was occaſioned by craft, and then uſed to the Vicolence intended.

Slander

Sanlder.

If a Man ſay to another, *Thou art a Rogue, and a Pocky Rogue, and the Pox haunts thee twice a Year*; an Action lies, for hereby 'tis apparent he intended the great Pox, becauſe theſe are wont to grieve thoſe that have them *bis per annum. viz.* in the *Spring* and *Autumn*. *Prekington's* Caſe. 1 *Roll.* 66, 67.

Where Circumſtances ſhew the apparent intention of Words doubtful in themſelves, that they are ſlanderous, an Action lies for them, as where one ſaid of a Woman [*That ſhe did lie with a Weaver of* Colcheſter *in a Ditch, and the Weaver's Breeches were down, and they were at it*] an Action lies, for altho' the Weaver might lie with her in a Ditch without harm, yet the latter Words ſhew he intended that the Weaver had carnal Knowledge of her. *Roll.* 1 *Rep.* 420. *Root* and *Molyne's* Caſe.

[*I know what I am, and I know what the Plaintiff is,* [*I never Buggered a Mare*:] *Per. Cur'* tho' no grammatical affirmation is a ſufficient ſcandal, yet being found with ſuch intention, and ſo imagined by the Hearers, the Ironical ſpeaking will not excuſe. *Jud. pro Quer'*. 3 *Keb.* 545.

Slander.

A. Says to *B. One of Us two is Perjured*: *B.* says to *A. It is not I*; and *A.* says again, *I am sure it is not I*: *B.* shall have an Action for these Words, for the subsequent Words shew apparently that he intends Him. 1 *Roll.* 75. *Coe* and *Chambers.*

Justice *Twisden* said, he remembred a *Shoe-maker* brought an Action for saying *He was a Cobler*; and tho' a *Cobler* be a Trade of it self, yet 'twas held the Action lay; in Chief Justice *Glyn*'s time. *Mod. Rep. fol.* 19. 1

Margaret Cummings brought an Action for these Words, *viz. Thou art a Whore, and a base burnt Arse Whore*, and adjudged Actionable. 2 *Siderf. fol.* 5. (the *French Pox* usually comes of burning, *Cro. Eliz.* 2.) but 'tis left a *Quære* there, whether the Words [*Thou art a burnt Whore*] will bear an Action.

Not Guilty.

A Man may plead *Not Guilty*, yet tell no lye, for by the Law no Man is bound to accuse himself, so that when I say *Not Guilty*, the meaning is, as if I should say by way of Paraphrase, *I am not so guilty*

as

as to tell you; if you will bring me to a Tryal, and have me punished for what you lay to my charge, prove it against me. Selden.

Presentation.

If I am seized of an Advowson, and I present to it as Procurator to a Stranger, this shall be an Usurpation upon my self for the Stranger.

So if I present to an Advowson, whereof I my self am seized, as Attorney to a Stranger, this is an Usurpation for him. 17 *E.* 3. 60.

Where a Child may choose his Father.

If a Man has a Wife and dies, and within a very short time after the Wife marries again, and within nine Months hath a Child, so as it may be the Child of the one or the other; some have said that in this Case the Child may choose his Father, *Quia in hoc casu Filiatio non potest probari*; for avoiding of which question, and other inconveniences; the Law before the Conquest was, *Sit omnis Vidua sine Marito duodecim mensibus, & si maritaverit perdat dotem.* 1 *Inst.* 8. *a.*

See

See *Finch* his Law 117. that if one die, his Wife *priviment enseint* (*i. e.* so with Child, as it is not discerned) and she take another Husband, the Issue born within a Month (or such a time as it is impossible he should beget it) shall be accounted the Son of her first Husband, and cites 21 *E.* 3. 29.

'Tis said the Law now is, That if a Wife bring forth a Child begotten by a former Husband, or any other before marriage, but born after marriage with another Man, this latter must own the Child, who shall be his Heir at Law.

Assault.

If a Man assault me, I am not bound to attend untill he strikes, but I may lay him on before in my own defence, for it may be I shall come too late afterwards. 2 *H.* IV. 8. *per Curiam.*

Wearing a Sword no breach of the Good Behaviour.

The Wearing of a Sword after one is bound to his Good Behaviour, is no breach of the Good Behaviour now; as perhaps it was heretofore (see *Cromp.* Justice of Peace 119. 126.) when Swords were not usually

uſually worn but by Soldiers, for then they ſtruck as great a Terror in People as a *Blunderbuſs* does now. But ſince at this Day Swords are uſually worn by all ſorts of People, this cannot now be conſtrued a breach of the Good Behaviour: So that which heretofore was a Crime, is now by Cuſtom become none. *Hawles Remarks*, &c. 81.

Slander.

ACTION will lie for theſe Words, [*This is the Whore that my Man* Thomas *begat a Baſtard on, and ſpent all my Money upon, and the Queen hath been too long in Town to my eaſe.*] *Stiles* 274. 277. 1. *Roll.* 38.

So for this [*He hath got* Mary Nab *with Child, and the Child is his, and I have rid it with a Sieve and a pair of Sheers.*] *Stiles* 279.

So for this, [*Thou art an Whoremaſter, for thou haſt lain with* Brown's *Wife, and haſt to do with her againſt a Chair,*] whereby he loſt his Marriage; tho' 'twas objected, This was the firſt Preſident where loſs of Marriage was ever laid for Words ſpoken of a Man. 2 *Cro.* 322. *Vide* 3 *Buls.* 98.

It will not lie for this, [A. *is an errant Whore, and would have lain with me Seven Years ſince, and I would not unleſs ſhe would go to the Hedge,*] for this is a Spiritual Slander only.

Wife

Wife a Chattel.

A MAN may justifie the Battery of another in defence of his Wife, for she is his Chattel. 2 *Roll.* 546. the end.

Prohibition.

A. WAS sued in the Ecclesiastical Court for beating his Wife, and calling her *Whore*, and sentenced to pay her three Shillings a Week for Alimony, and divers Fines were imposed upon him for non-performance, and provided he should enter into a Recognizance; a Prohibition was granted. 2 *Brownl.* 36. *Agar's* Case.

Complaint in the Spiritual Court by the Wife against her Husband.

CLODORN's Wife complained against him in the Spiritual Court *causâ sævitiæ*, for that he gave her a Box on the Ear, and spate in her Face, and whirled her about, and called her *Damn'd Whore*: This was not by Libel, but verbal Accusation, reduced after to writing. The Husband denied it, but the Court ordered him to give her four Pound every Week *pro Expensis Litis* and Alimony; whereupon he moved

ved for a Prohibition, ſuggeſting that he chaſtized his Wife for a reaſonable cauſe, as by the Law of the Land he well might, after which ſhe went from him, and that they were reconciled again, which took away the former *ſævitia*, as reconciliation after Elopement. *Richardſon* Chief Juſtice ſaid, The Suit being held without Libel is no ground for a Prohibition, if they proceed according to their Form, which we are not Judges of, but if they deny a Copy of the Libel, a Prohibition lies by the Statute. For the matter; The Sentence in *causâ ſævitiæ* is *à Menſâ & Thoro*, and we cannot examine what is cruelty and what not: But without doubt the matter alledged is cruelty, for ſpitting in the Face was puniſhable by the Star-Chamber: But if *Cleborn* had juſtified, and ſet forth a Provocation by the Wife to give her reaſonable caſtigation, there would be ſome colour for a Prohibition: and they adviſed him to tender a Juſtification, and if refuſed, then to move for a Prohibition. *Hetley* 149. 150.

Where

Where a Horſe ſhall be led to the Pound with his Rider on his Back.

A HORSE whereon a Man is riding cannot be diſtrained for Rent: But Chief Juſtice *Keeling* was of opinion that ſuch a Horſe may be diſtrained Damage Feaſant, and that he ſhall be led to the Pound with his Rider upon him. 1 *Siderfin* 440.

FINIS.

A Catalogue of Books, ſome of them newly Printed for Sam. Briſcoe *over-againſt* Will's *Coffee-Houſe in* Ruſſel-Street *in* Covent-Garden.

THE Hiſtory of *Polybius* the *Megalopolitan*, containing a general Account of the Tranſactions of the World, and principally of the *Roman* People, during the firſt and ſecond *Punick* Wars, with *Maps*; deſcribing the Places where the moſt conſiderable Engagement and Battles were fought, both by Sea and Land: Alſo an Account of their Policies and Stratagems of War, of the Ancient *Romans*, in Conquering the greateſt part of the then known World, in Fifty three years: Tranſlated by Sir *H. S.* To which is added, a Character of *Polybius* and his Writings: By Mr. *Dryden*, in Two Volumes. 8*vo.* Price 10 *s.*

The Lives of the Twelve *Cæſars* the firſt Emperors of *Rome*. Written in Latin by *C. Suetonius Tranquillus*. Tranſlated into *Engliſh* by ſeveral eminent Hands, with the Heads of the Emperors on Copper Plates.

Advice to a Young Lord, Written by his Father, under theſe following Heads, *viz. Religion, Study* and *Exerciſe, Travel, Marriage, Houſe keeping, Hoſpitality*, of the *Court*,

of

of Pleasure and Interest, of Conversation.

Aristotle's Rethorick, or the true Grounds and Principles of Oratory, shewing the right Art of Pleading and Speaking in full Assemblies and Courts of Judicature. In four Books. Second Edition.

The Religious Stoick, or a short Discourse on several Subjects, *Viz.* Of *Atheism, Superstition, the World's Creation, Eternity, Providence, Theology, Strictness of Churches, of the Scriptures, of the Moral and Judicial Law, of Monsters, of Man and his Creation, of the Immortality of the Soul, of Faith and Reason, of the Fall of Angels, and what their Sin was, of Man's Fall, of the Stile of* Genesis, *why Men fell, with a Refutation to the* Millennaries, *with a Friendly Address to the* Fanaticks *of all Sects and Sorts.* The Second Edition, by Sir *George Mackenzie.*

A Moral Essay, preferring Solitude to Publick Employment, and all its Appennages, such as Fame, Command, Riches, Pleasures, Conversation. By Sir *George Mackenzie.* Second Edition.

Jovial Poems and Songs by several Hands.

Ovid's Epistles, Translated by several Hands, Adorned with Cuts.

Physical and Mathematical Memoirs. Written at the Royal Academy of *Paris.*

Where you may be furnished with most sorts of Plays.